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Supreme Court of the United States

OCTOBER TERM, 1909

No. 391

**MARION J. SLOCUM, AS GENERAL CHAIRMAN,
LACKAWANNA DIVISION No. 30 OF THE ORDER
OF RAILROAD TELEGRAPHERS, PETITIONER,**

vs.

**THE DELAWARE, LACKAWANNA & WESTERN
RAILROAD COMPANY**

**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE
OF NEW YORK**

PETITION FOR CERTIORARI FILED OCTOBER 14, 1909.

CERTIORARI GRANTED DECEMBER 1, 1909.

SUPREME COURT OF THE UNITED STATES

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LACKAWANNA DIVISION No. 30 OF THE ORDER
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RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE
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EXHIBITS

Plaintiff's Exhibits:

Exhibit No. 1—Agreement between D. L. & W. R. E. and Telegraphers, January 1, 1929. Received in evidence at Fol. 60. Not printed.

Exhibit No. 2—Book of Rules, pages 84 to 87 and 118 to 122 inclusive. Received in evidence at Fol. 65. Not printed.

Exhibit No. 3—Agreement (Old) between R. R. and Clerks. Received in evidence at Fol. 70. Not printed.

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Exhibit No. 7—Letter, dated August 11, 1939, from W. G. Alexander, Superintendent, to Mr. R. D. West, Local Chairman, B. of R. T. Received in evidence at Fol. 79.	351	254
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Exhibit No. 11—Letter, dated June 4, 1942, from O. L. Chadwick to Mr. J. H. Lerbs, Superintendent. Received in evidence at Fol. 92.	358	258
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Exhibit No. 14—Letter, dated October 9, 1942, from J. L. Elliott, Vice-President, to Mr. E. B. Moffatt, Asst. Vice President, DL&W RR Co. Received in evidence at Fol. 96.	361	260
Exhibit No. 15—Letter, dated August 1, 1939, from R. D. West, Local Chairman, to Mr. W. G. Alexander, Superintendent. Received in evidence at Fol. 99.	363	261
Exhibit No. 16—Letter, dated July 24, 1943, from M. J. Slocum, General Chairman, to Mr. P. M. Shoemaker, General Superintendent. Received in evidence at Fol. 139.	365	262
Exhibit No. 17 for Identification—Letter, dated July 9, 1940, from Mr. Gardner to Mr. Chadwick. Received in evidence at Fol. 196. Not printed.		

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Exhibit B for Identification—Letter, dated January 19, 1943, from J. L. Elliott, Vice-President, to Mr. P. M. Shoemaker, General Superintendent, DL&W RR Co. Marked for identification at Fol. 96	368	264
Exhibit C—Letter, dated November 26, 1939, from O. L. Chadwick, General Chairman, to Mr. E. B. Moffatt, General Superintendent. Received in evidence at Fol. 183	369	264
Exhibit D—Letter, dated September 4, 1939, from O. L. Chadwick, General Chairman, to Mr. E. B. Moffatt, General Superintendent. Received in evidence at Fol. 186	371	266
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Exhibit F—Letter, dated April 27, 1943, from M. J. Slocum, General Chairman, to Mr. E. B. Moffatt, Assistant to the President. Received in evidence at Fol. 250	374	268
Exhibit G—Letter, dated June 27, 1943, from M. J. Slocum, General Chairman, to Mr. P. M. Shoemaker, General Superintendent. Received in evidence at Fol. 250	376	269
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Exhibit 3—Agreement between D. L. & W. R. R. and Clerks, October 1, 1934. Received in evidence at Fol. 70	422	302
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[fol. 1]

STATE OF NEW YORK, SUPREME COURT, APPELLATE DIVISION, THIRD DEPARTMENT

**THE DELAWARE, LACKAWANNA & WESTERN RAILROAD
COMPANY, Plaintiff-Respondent,**

VS.

**MARION J. SLOCUM, as General Chairman of Lackawanna
Division No. 30 of the Order of Railroad Telegraphers,
Defendant-Appellant,**

and

**LOUIS J. CARLO, as General Chairman of System Board of
Adjustment, Delaware, Lackawanna and Western Rail-
road, of Brotherhood of Railway and Steamship Clerks,
Freight Handlers, Express and Station Employees, De-
fendant**

STATEMENT UNDER RULE 234

This is an action commenced by the service of a copy of the Summons and Complaint on the defendant, Slocum, on the 3rd day of March, 1944, and on the defendant, Carlo, on the 10th day of March, 1944, in which the plaintiff seeks a declaratory judgment declaring the rights, obligations, liabilities and legal relations of the parties in relation to an alleged controversy arising under agreement between the plaintiff and each of the two defendants, as collective bargaining agents for certain classes of employees of the plaintiff who are members of the organizations represented by the persons named as defendants.

[fol. 2] The defendant, Slocum, petitioned for the removal of this action to the United States District Court, Western District of New York by petition filed in the Supreme Court, State of New York, Chemung County, on the 23rd day of March, 1944. Said petition was denied in a Memorandum by the late Hon. Ely W. Personious, Justice of the Supreme Court which is reported in 286(a) Misc. Reports, volume 182. The defendant, Slocum, filed the record herein with the Clerk of the United States District Court, Western District of New York, on the 12th day of April, 1944. On May 2, 1944, the defendant, Slocum, made a motion before the said

United States District Court for the dismissal of the plaintiff's complaint. The plaintiff, at the same time, made a motion for remission of the cause to the Supreme Court, State of New York, Chemung County. The said United States District Court denied the motion of defendant, Slocum, for dismissal of the plaintiff's complaint and granted the plaintiff's motion for remission of the cause by an Order dated June 30, 1944, after having handed down a Memorandum dated June 21, 1944, which is reported in 56 Fed. Supp. 634.

The defendant, Slocum, interposed a verified Answer on the 31st day of July, 1944, and the defendant, Carlo, interposed a verified Answer on or about May 1, 1944. The plaintiff filed a Note of Issue placing the action on the trial calendar of the Supreme Court, State of New York, Chemung County, for the February term of Court, and on February [fol. 3] 5, 1945 the defendant, Slocum, made a motion before said Court for judgment under Rules 112 and 113. The said motion was denied by an Order dated March 24, 1945, with an opinion handed down by the Hon. B. L. Newman, Justice of said Court, dated March 22, 1945, which is a part of the record.

An appeal was taken from said Order to the Appellate Division of the Supreme Court, Third Department, and the said Order was affirmed in an opinion by Justice Hill, Presiding Justice, reported in 267 A. D. 467. The action was then brought on for trial before the Hon. B. L. Newman, without a jury, on the 6th day of August, 1945. Findings of Fact and Conclusions of Law and a Judgment based thereon were entered on the 7th day of March, 1946, and an appeal was taken from said Judgment to the Appellate Division, Third Department.

[fol. 4]

NOTICE OF APPEAL

STATE OF NEW YORK, SUPREME COURT, COUNTY OF CHEMUNG

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD
COMPANY, Plaintiff,

vs.

MARION J. SLOCUM, as General Chairman of Lackawanna
Division No. 30 of The Order of Railroad Telegraphers,
and Louis J. Carlo, as General Chairman of System
Board of Adjustment, Delaware, Lackawanna and West-
ern Railroad, of Brotherhood of Railway and Steamship
Clerks, Freight Handlers, Express and Station Em-
ployees, Defendants

SIRS:

Please Take Notice that Marion J. Slocum, etc., one of the
defendants in this action, hereby appeals to the Appellate
Division of the Supreme Court for the Third Judicial
Department from the final judgment of the Supreme Court
entered herein in the office of the Clerk of the County of
Chemung on the 7th day of March, 1946; wherein and
whereby the rights of the parties herein under various con-
[fol. 5] tracts between them were declared and adjudged,
and from each and every part of said judgment.

Dated: Buffalo, New York, April 9, 1946.

Yours, etc., John F. Dwyer, Attorney for Defendant,
Marion J. Slocum, Office and P. O. Address, 406
Erie County Bank Bldg., Buffalo 2, New York.

To Sayles, Flannery & Evans, Esqs., Attorneys for Plain-
tiff, Office and P. O. Address, 415 East Water Street,
Elmira, New York. Mandeville, Buck, Teeter & Harpend-
ing, Esqs., Attorneys for Defendant, Louis J. Carlo, Office
and P. O. Address, The Robinson Building, Elmira, New
York. Clerk of the Appellate Division, Supreme Court,
Third Department, Albany, New York.

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[fol. 6]

SUMMONS

STATE OF NEW YORK, SUPREME COURT, COUNTY OF CHEMUNG

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD
COMPANY, Plaintiff,

against

MARION J. SLOCUM, as General Chairman of Lackawanna
Division No. 30 of The Order of Railroad Telegraphers,
and Louis J. Carlo, as General Chairman of System
Board of Adjustment, Delaware, Lackawanna and West-
ern Railroad, of Brotherhood of Railway and Steamship
Clerks, Freight Handlers, Express and Station Em-
ployees, Defendants

To the above named Defendants:

You Are Hereby Summoned to answer the complaint in
this action, and to serve a copy of your answer, or, if the
complaint is not served with this summons, to serve a notice
of appearance, on the plaintiff's attorneys within twenty
days after the service of this summons, exclusive of the day
of service. In case of your failure to appear or answer,
judgment will be taken against you by default for the relief
demanded in the complaint.

[fol. 7] Trial to be held in the County of Chemung.

Dated, February 26, 1944.

Sayles, Flannery & Evans, Attorneys for Plaintiff,
Office and Post Office Address, 415 East Water
Street, Elmira, New York.

COMPLAINT

(Same Title)

Plaintiff for its complaint alleges:

1. That at all the times herein mentioned plaintiff was and
still is a foreign railroad corporation duly organized, in-
corporated and existing under and by virtue of the laws of
the Commonwealth of Pennsylvania and operating a rail-

road through the States of New York, New Jersey and Pennsylvania; that plaintiff has duly complied with all the provisions of Section 210 of the General Corporation Law and obtained a certificate from the State of New York of authority to do business within said state; that plaintiff has duly complied with all the provisions of Section 181 of the Tax Law, paid the license tax imposed by said section on foreign corporations doing business in the State of New York and obtained a receipt therefor; that plaintiff has in all respects complied with the laws of the State of New York permitting foreign corporations to become lessees of real estate in said state and to maintain actions in the courts of said state, and [fol. 8] that plaintiff is a resident of the County of Chemung by reason of the fact that its line crosses said county and it has, at all the times hereinafter mentioned, maintained and still maintains within said county and within the City of Elmira certain railroad tracks, a passenger station commonly known and designated as "Elmira Passenger Station", a yard office commonly known and designated as "Elmira Yard 'MS'" and a tower commonly known and designated as "LV Tower".

2. That Marion J. Slocum is the General Chairman and principal officer of Lackawanna Division No. 30 of The Order of Railroad Telegraphers, which is an unincorporated association existing and constituted for the purpose of collective bargaining and of dealing with plaintiff concerning grievances, terms or conditions of employment of certain of plaintiff's employees, hereinafter specifically designated, and as such has been duly certified under the Railway Labor Act (Chapter 8, Title 45, U. S. C. A.).

3. That said Lackawanna Division No. 30 of The Order of Railroad Telegraphers, between January 1, 1929 and April 30, 1940, was recognized by plaintiff as the sole bargaining agent only for that certain class or group of employees employed by plaintiff in or who were qualified to hold those positions the duties of which came within the scope of the scope rule of and which were listed in an agreement between plaintiff and said Lackawanna Division No. 30 of The Order of Railroad Telegraphers, effective January 1, 1929, entitled "Rules and Rates of Pay for Telegraphers", a copy of which said agreement is hereto annexed and hereby made a part hereof as if set out herein in full, marked "Exhibit A", there being listed therein and

covered thereby the positions of three clerk operators employed at Elmira Passenger Station, three operators employed in Elmira Yard "MS" and three towermen employed in "LV" Tower.

4. That said agreement, Exhibit A, was in full force and effect only between January 1, 1929 and April 30, 1940.

5. That said Lackawanna Division No. 30 of The Order of Railroad Telegraphers, in the negotiation and execution of said agreement effective January 1, 1929, Exhibit A, and in its dealings with plaintiff involving the application and enforcement thereof between January 1, 1929 and April 30, 1940, acted by and through its General Chairman who was the principal officer thereof.

6. That said Lackawanna Division No. 30 of The Order of Railroad Telegraphers, subsequent to May 1, 1940, was and is recognized by plaintiff as the sole bargaining agent only for that certain class or group of employees employed by plaintiff in or who are qualified to hold those positions the duties of which come within the scope of the scope rule of and which are listed in an agreement between plaintiff and said Lackawanna Division No. 30 of The Order of Railroad Telegraphers, effective May 1, 1940, entitled "Rules and Rates of Pay for Telegraphers," a copy of which said [fol. 10] agreement is hereto annexed and hereby made a part hereof as if set out herein in full, marked "Exhibit B," there being listed therein and covered thereby the positions of three operator-towermen employed in "LV" Tower and three operator-clerks employed at Elmira Passenger Station.

7. That said agreement, Exhibit B, effective May 1, 1940, superseded and cancelled said agreement effective January 1, 1929, Exhibit A, and is and has been since May 1, 1940 in full force and effect.

8. That said Lackawanna Division No. 30 of The Order of Railroad Telegraphers, in the negotiation and execution of said agreement effective May 1, 1940, Exhibit B, and in its dealings with plaintiff involving the application and enforcement thereof commencing May 1, 1940, has acted and still acts by and through its General Chairman who is the principal officer thereof.

9. That said Lackawanna Division No. 30 of The Order of Railroad Telegraphers, by and through its General Chairman, represents only those employees occupying or qualified to hold those positions the duties of which come within the scope of the scope rule of and which are listed in said agreement effective May 1, 1940, Exhibit B.

10. That the defendant, Louis J. Carlo, is the General Chairman and principal officer of System Board of Adjustment, Delaware, Lackawanna and Western Railroad, of [fol. 11] Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, which is an unincorporated association existing and constituted for the purpose of collective bargaining and of dealing with plaintiff concerning grievances, terms or conditions of employment of certain of plaintiff's employees, hereinafter specifically designated, and as such was, on October 12, 1937, duly certified under said Railway Labor Act.

11. That said System Board of Adjustment, Delaware, Lackawanna and Western Railroad, of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, pursuant to said certification of October 12, 1937, took over an agreement between plaintiff and Association of Clerical Forces of the Lackawanna Railroad, effective October 1, 1934, entitled "Rules and Working Conditions for Clerical Forces," a copy of which said agreement is hereto annexed and hereby made a part hereof as it set out herein in full, marked "Exhibit C," and between October 12, 1937 and December 31, 1938, was recognized by plaintiff as the sole bargaining agent only for that certain class or group of employees employed by plaintiff in or who were qualified to hold those positions the duties of which came within the scope of the scope rule of said agreement, Exhibit C, there being included therein and covered thereby the positions of the crew-callers employed in Elmira Yard "MS".

12. That said agreement, Exhibit C, was in full force and effect only between October 1, 1934 and December 31, 1938.

[fol. 12] 13. That said System Board of Adjustment, Delaware, Lackawanna and Western Railroad, of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, in its dealings with plaintiff involv-

ing the application and enforcement of said agreement effective October 1, 1934, Exhibit C, between October 12, 1937 and December 31, 1938, acted by and through its General Chairman who was the principal officer thereof.

14. That said System Board of Adjustment, Delaware, Lackawanna and Western Railroad, of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, subsequent to January 1, 1939 was and is recognized by plaintiff as the sole bargaining agent only for that certain class or group of employees employed by plaintiff in or who are qualified to hold those positions the duties of which come within the scope of the scope rule of an agreement between plaintiff and said System Board of Adjustment, Delaware, Lackawanna and Western Railroad, of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, dated January 31, 1939, effective January 1, 1939, a copy of which said agreement is hereto annexed and hereby made a part hereof as if set out herein in full, marked "Exhibit D," there being included therein and covered thereby the positions of the crew-callers employed in Elmira Yard "MS".

15. That said agreement, Exhibit D, effective January 1, 1939, superseded and cancelled said agreement effective [fol. 13] October 1, 1934, Exhibit C, and is and has been since January 1, 1939, in full force and effect.

16. That said System Board of Adjustment, Delaware, Lackawanna and Western Railroad, of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, in the negotiation and execution of said agreement, effective January 1, 1939, Exhibit D, and in its dealings with plaintiff involving the application and enforcement thereof commencing January 1, 1939, has acted and still acts by and through its General Chairman who is the principal officer thereof.

17. That said System Board of Adjustment, Delaware, Lackawanna and Western Railway of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, by and through its General Chairman, represents only those employees occupying or qualified to hold those positions the duties of which come within the scope of the scope rule of said agreement effective January 1, 1939, Exhibit D.

18. That effective May 1, 1938, plaintiff, pursuant to the terms and conditions of said agreement effective January 1, 1929, Exhibit A, and without protest by and with the express consent of said Lackawanna Division No. 30 of The Order of Railroad Telegraphers acting by and through its General Chairman, abolished the positions of the three towermen at "LV" Tower and three operators at Elmira [fol. 14] Yard "MS", created three positions of "operator-towermen's at "LV" Tower, and transferred the work of the three towermen and three operators positions thus abolished, which came within the scope of the scope rule of said agreement effective January 1, 1929, Exhibit A, to said three operator-towermen located in said "LV" Tower and to the three clerk-operators located in Elmira passenger station, said three clerk-operators being listed in and the work of said three operator-towermen coming within the scope of the scope rule of said agreement, Exhibit A; that by that and subsequent action and acquiescence of said Lackawanna Division No. 30 of The Order of Railroad Telegraphers, said Lackawanna Division No. 30 of The Order of Railroad Telegraphers, and the members and General Chairman thereof, became and are estopped from claiming that the transfer of said work violated said agreement effective January 1, 1929, Exhibit A.

19. That the positions of the three operators at Elmira Yard "MS" and of the three towermen at "LV" Tower, abolished May 1, 1938, were, by mutual agreement, specifically eliminated from said agreement effective May 1, 1940, Exhibit B and the positions of three operator-towermen at "LV" Tower, created May 1, 1938, were, by mutual agreement, specifically included and listed in said agreement effective May 1, 1940, Exhibit B; that by that and subsequent action and acquiescence of said Lackawanna Division No. 30 of The Order of Railroad Telegraphers, said Lackawanna Division No. 30 of The Order of Railroad [fol. 15] Telegraphers, and the members and General Chairman thereof, became and are estopped from claiming that the transfer of said work mentioned and described in paragraph "18" hereof came within the scope of the scope rule of said agreement effective May 1, 1940, Exhibit B.

20. That on June 4, 1942, said Lackawanna Division No. 30 of The Order of Railroad Telegraphers, acting by and through its General Chairman, requested plaintiff to take

away from said crew-callers employed in said Elmira Yard "MS" who were included in, covered by and performing work coming within the scope of the scope rule of said agreement, Exhibit D, certain work which between October 1, 1934 and December 31, 1938 came within the scope of the scope rule of said agreement, Exhibit C, and which has, since January 1, 1939, come within the scope of the scope rule of said agreement, Exhibit D, effective since January 1, 1939, and which said crew-callers are and have been continuously performing under the scope of the scope rule of either said agreement, Exhibit C, or said agreement, Exhibit D, since October 1, 1934, to assign said work to men on the telegraphers' extra list and to pay three men on said telegraphers' extra list, who did no work themselves, for said work performed by said crew-callers from May 1, 1938.

21. That Association of Clerical Forces of the Lackawanna Railroad, acting by and through its General Chairman, maintained between October 1, 1934 and October 11, [fol 16] 1937 that all work performed by said crew-callers came within the scope of the scope rule of said agreement of October 1, 1934, Exhibit C.

22. That said System Board of Adjustment, Delaware, Lackawanna and Western Railroad, of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, acting by and through its General Chairman, maintained between October 12, 1937 and December 31, 1938 that all work performed by said crew-callers came within the scope of the scope rule of said agreement, Exhibit C, and has, since January 1, 1939, maintained, and still maintains, that all work performed by said crew-callers comes within the scope of the scope rule of said agreement, Exhibit D.

23. That said Lackawanna Division No. 30 of The Order of Railroad Telegraphers, acting by and through its General Chairman, has, since June 4, 1942, maintained and still maintains that said certain work performed by said crew-callers comes within the scope of the scope rule of said agreement effective May 1, 1940, Exhibit B, and can only be performed by employees covered by that agreement, and that three men on the telegraphers' extra list, who did no work themselves, should be paid under said agreement, Exhibit B, for

said work performed by said crew-callers retroactively to May 1, 1938.

24. That a dispute exists between said Lackawanna Division No. 30 of The Order of Railroad Telegraphers and the [fol. 17] Members and General Chairmap thereof and said System Board of Adjustment, Delaware, Lackawanna and Western Railroad, of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and the Members and General Chairman thereof as to whether said work performed by said crew-callers comes within the scope of the scope rule of said agreement, Exhibit B, or said agreement, Exhibit D, said Lackawanna Division No. 30 of The Order of Railroad Telegraphers maintaining that such work comes within the scope of the scope rule of said agreement, Exhibit B, and said System Board of Adjustment, Delaware, Lackawanna and Western Railroad, of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, maintaining that such work comes within the scope of the scope rule of its agreement, Exhibit D.

25. That plaintiff believes and has taken the position in its dealings with defendants, their predecessors in office and their said associations and the members thereof that all such work performed by said crew-callers between October 1, 1934 and December 31, 1938, came within the scope of the scope rule of said agreement, Exhibit C, that all such work performed by said crew-callers subsequent to January 1, 1939 and now being performed by them comes within the scope of the scope rule of said agreement, Exhibit D, and that at no time have said crew-callers performed any work which came within the scope of the scope rule of either of [fol. 18] said agreements, Exhibit A or Exhibit B.

26. Upon information and belief that without a declaration by this Court of the rights of the parties to said agreements and to this action under said agreements, Exhibits A, B, C and D, if plaintiff recognizes the claim of said Lackawanna Division No. 30 of The Order of Railroad Telegraphers, that said certain work performed by said crew-callers comes within the scope of the scope rule of said agreement, Exhibit B, and does not come within the scope of the scope rule of said agreement, Exhibit D, said System Board of

Adjustment, Delaware, Lackawanna and Western Railroad, of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, will progress a claim that plaintiff has violated said agreement, Exhibit D, the basis thereof being that all the work performed by said crew-callers comes within the scope of the scope rule of said agreement, Exhibit D, and present the same under the Railway Labor Act to the Third Division of the National Railroad Adjustment Board.

27. Upon information and belief that without a declaration by this Court of the rights of the parties to said agreements and to this action under said agreements, Exhibits A, B, C and D, if plaintiff continues to recognize the claim of said System Board of Adjustment, Delaware, Lackawanna and Western Railroad, of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, that all work performed by said crew-callers comes within the scope of the scope rule of said agreement, Exhibit D, and does not come within the scope of the scope rule of said agreement, Exhibit B, said Lackawanna Division No. 30 of The Order of Railroad Telegraphers will present its claim that three men on the telegraphers' extra list, who did no work themselves, should be paid under said agreement, Exhibit B, for said certain work performed by said crew-callers retroactively to May 1, 1938, under the Railway Labor Act to the Third Division of the National Railroad Adjustment Board.

28. Upon information that without a declaration by this Court of the rights of the parties to said agreements and to this action under said agreements, Exhibits A, B, C and D, plaintiff, if it recognizes the claim of said Lackawanna Division No. 30 of The Order of Railroad Telegraphers, that such work performed and being performed by said crew-callers comes within the scope of the scope rule of said agreement, Exhibit B, will be subjected by said System Board of Adjustment, Delaware, Lackawanna and Western Railroad, of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, to a multiplicity of claims that men on the clerks' extra list, who did no work themselves, be paid for such work performed by telegraphers and otherwise will be irreparably damaged.

29. Upon information and belief that without a declaration by this Court of the Rights of the parties to said agreements [fol. 20] and to this action under said agreements, Exhibits A, B, C and D, plaintiff, if it continues to take the position in its dealings with said Lackawanna Division No. 30 of The Order of Railroad Telegraphers, that all work which has been since October 1, 1934 and which continues to be performed by said crew-callers comes within the scope of the scope rule of either said agreement, Exhibit C, or said agreement, Exhibit D, will be subjected by said Lackawanna Division No. 30 of The Order of Railroad Telegraphers, to a multiplicity of claims that men on the telegraphers' extra list, who did no work themselves, be paid for said certain work performed by said crew-callers and otherwise will be irreparably damaged.

30. That plaintiff has no adequate remedy at law and no adequate remedy before the National Railroad Adjustment Board since there is no procedure whereby plaintiff can bring said claims jointly before the Third Division or any Division of the National Railroad Adjustment Board for determination, or whereby in the event that either said Lackawanna Division No. 30 of The Order of Railroad Telegraphers or said System Board of Adjustment, Delaware, Lackawanna and Western Railroad, of Brotherhood of Railway Steamship Clerks, Freight Handlers, Express and Station Employees, presents its claim to the Third Division of the National Railroad Adjustment Board, plaintiff can implead or make the other association a party thereto so that such other association will be bound by any decision [fol. 21] rendered by said Third Division of the National Railroad Adjustment Board.

31. That the subject of this action has not been submitted to any court, tribunal or board for determination, nor has any court, tribunal or board assumed jurisdiction thereof.

Wherefore, plaintiff demands judgment as follows:

1. That the Court declare the rights and other legal relations of plaintiff and said Lackawanna Division No. 30 of The Order of Railroad Telegraphers, under said agreements, Exhibits A and B, insofar as the same relate to the work performed by said crew-callers.

2. That the Court declare the rights and other legal relations of plaintiff and said System Board of Adjustment, Delaware, Lackawanna and Western Railroad, of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, under said agreements, Exhibits C and D, insofar as the same relate to the work performed by said crew-callers.

3. That the Court declare that all work heretofore and now being performed by said crew-callers comes within the scope of the scope rule of said agreements Exhibit C and Exhibit D respectively during the effective periods of said agreements.

4. That the Court declare that said Lackawanna Division No. 30 of The Order of Railroad Telegraphers, and the members and General Chairman thereof, by their action as hereinbefore set forth, became and are forever estopped from claiming that any work performed by said crew-callers since May 1, 1938 came within the scope of the scope rule of said agreement, Exhibit A, or comes within the scope of the scope rule of said agreement Exhibit B, and that men on the telegraphers' extra list who did no work themselves be paid for any work performed by said crew-callers retroactively to May 1, 1938.

5. That plaintiff have such other and further relief as may result in a full and complete determination of all matters in controversy arising out of the facts herein set forth and that the Court declare the rights, obligations, liabilities and legal relations of the parties to said agreements and to this action arising by reason of said agreements and the matters hereinbefore set forth and that the Court grant such other and further relief as may be just and proper or necessary and suitable in the premises together with the costs and disbursements of this action.

Sayles, Flannery & Evans, Attorneys for Plaintiff,
415 East Water Street, Elmira, New York.

[fol. 23] —

EXHIBIT A

**The Delaware, Lackawanna and Western Railroad
Company**

Rules and Rates of Pay for Telegraphers

January 1, 1929

Form T 56

in Printed Book Form

EXHIBIT B

**The Delaware, Lackawanna and Western Railroad
Company**

Rules and Rates of Pay for Telegraphers

May 1, 1940

in Printed Book Form

EXHIBIT C

**The Delaware, Lackawanna and Western Railroad
Company**

Rules and Working Conditions for Clerical Forces

October 1, 1934

(1934 Schedule)

in Printed Book Form

[fol. 24]

EXHIBIT D

Agreement Between the Delaware, Lackawanna and Western Railroad and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees

January 1, 1939

(1939 Schedule)

in Printed Book Form

STATE OF NEW YORK,

County of New York, ss:

Wm. White, being duly sworn, deposes and says that he is an officer, to-wit, the president of the plaintiff in this action; that he has read the foregoing complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

Wm. White.

Sworn to before me this 28th day of February, 1944.
Joseph Fiell, Notary Public. (Seal.)

[fol. 25] Answer of Defendant Louis J. Carlo, etc.

(Same Title)

The defendant, Louis J. Carlo, as General Chairman of System Board of Adjustment, Delaware, Lackawanna and Western Railroad, of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, (referred to hereinafter as System Board of Adjustment), answering the plaintiff's complaint herein:

1. Admits that the allegations contained in paragraphs thereof marked "1", "2", "3", "4", "5", "6", "7", "8", "9", "10", "11", "12", "13", "14", "15", "16", "17" and "31" are true and that effective May 1, 1938, plaintiff abolished certain positions and transferred certain work as alleged in paragraph thereof marked "18".

2. He denies that he has any knowledge or information sufficient to form a belief as to the truth or falsity of each or any of the other allegations contained in paragraphs thereof marked "18", "19", "20", "25", "27", "29" and "30".

3. Answering paragraphs "21", "22" and "23" of the complaint, this defendant admits that the System Board of Adjustment has claimed and still claims, and this defendant now alleges that the general duties of the positions of the three crew callers employed by the plaintiff at its Elmira yard are such as to fall within the scope of the agreements between the plaintiff and said System Board of Adjustment, to wit: Exhibits "C" and "D" attached to the complaint, and that the said crew callers are members of the craft or class of employees represented by the System Board of Adjustment. Further answering, however, this defendant says that he is informed that duties have been assigned to such employees which may be considered as falling within the general class of work performed by employees working under agreements between the plaintiff and Lackawanna Division No. 30 of the Order of Railroad Telegraphers. This defendant has no knowledge as to the exact nature of such work, if any, or as to its extent, but believes and alleges that at most it occupies but a small portion of the time of said crew callers. If it should be determined that the said crew callers are actually performing work properly within the scope of the agreements between the plaintiff and Lackawanna Division No. 30 of the Order of Railroad Telegraphers, then this defendant is informed, believes and so alleges that neither he nor the System Board of Adjustment, has, makes or will make any objection to the reassignment of such work to employees represented by Lackawanna Division No. 30 of the Order of Railroad Telegraphers.

4. In answer to paragraph "24" of the complaint, this defendant admits that System Board of Adjustment, has claimed and now claims all of the work normally performed by the three crew callers employed by the plaintiff at its Elmira Yard as being work subject to its agreement with [fol. 27] the plaintiff, with the possible exception mentioned in paragraph 3 above. This defendant has no knowledge as to the truth or falsity of each or any of the allegations con-

tained in Paragraph "24" of the complaint to the effect that a claim is being made against the plaintiff by Lackawanna Division No. 30, of the Order of Railroad Telegraphers, and for want of such knowledge, denies the same. Each and every other allegation contained in Paragraph "24" of the complaint not admitted or denied for want of knowledge, are denied.

5. This defendant admits that if the plaintiff refuses to compensate any person represented by the System Board of Adjustment for work which such person is entitled to perform under the agreements between the plaintiff and said System Board of Adjustment, to wit: Exhibits "C" and "D" attached to the complaint, the said System Board of Adjustment will in every way available to it prosecute the claim of such person for such compensation. This defendant denies each and every allegation contained in paragraphs thereof marked "26" and "28".

6. He denies each and every other allegation in said complaint contained.

Wherefore, the defendant, Louis J. Carlo, as General Chairman of System Board of Adjustment, Delaware, Lackawanna and Western Railroad, of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express [fol. 28] and Station Employees, demands judgment dismissing the plaintiff's complaint as against him with costs.

Mandeville, Buck, Teeter and Harpending, Attorneys for the Defendant, Louis J. Carlo, as General Chairman of System Board of Adjustment, Delaware, Lackawanna and Western Railroad, of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, Office and P. O. Address, 521-529 Robinson Building, Elmira, New York.

(Verified by Louis A. Carlo, May 1, 1944.)

Answer of Defendant-Appellant Marion J. Slocum

(Same Title)

The above named defendant, Marion J. Slocum, through John F. Dwyer, his attorney, in answer to the plaintiff's complaint herein, alleges:

First: Admits the allegations contained in paragraphs numbered "1", "2", "3", "4", "5", "8", and "23" of plaintiff's complaint.

Second: Denies each and every allegation contained in paragraphs numbered "9", "18", "19", "20", "24", [fol. 29] "27", "28", "29", "30" and "31" of plaintiff's complaint.

Third: Denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraphs numbered "10", "11", "12", "13", "14", "15", "16", "17", "21", "22", "25" and "26" of plaintiff's complaint.

Fourth: That Lackawanna Division No. 30 of the Order of Railroad Telegraphers has continuously, since May 1, 1919, had in effect with the plaintiff various contracts effective as follows: May 1, 1919, January 1, 1923, February 15, 1924, March 1, 1926, January 1, 1927, January 1, 1929, May 1, 1940; and that each agreement superseded the agreement immediately preceding it.

Fifth: That in each of said agreements there was defined in a "scope rule" the class or classes of employees, and that each of said definitions observe the functions of a telegrapher that throughout the railroad industry in the United States, all communications originally were handled by telegraph, and upon the transition of the methods of communication in which the instrument of the telephone, replaced the instrument of the telegraph, the transmission of all communications requiring recording continued to be handled by that class of persons known in the railroad industry as telegraphers and telegrapher operators; and that the scope rule, in each of the above said agreements, set up the classes of employees covered by said agreements, and that each of [fol. 30] said definitions observed and included the classes of employees who had historically been considered as telegraphers and telegrapher operators.

Sixth: That each of said agreements, while superseding the agreement immediately preceding it, did not cancel the preceding agreement, and that the agreement effective May 1, 1940, listed various positions together with their rates of pay, which then were in existence as of the effective date of said agreement.

Seventh: That prior to May 1, 1938, there were in existence in the Elmira Yard Office of the plaintiff three positions falling within the scope rule of each of said agreements.

Eighth: That on May 1, 1938, plaintiff, without notice to or conference with the Order of Railroad Telegraphers, eliminated said positions and transferred a portion of the duties previously performed by the operator telegraphers in the Elmira Yard Office to crew callers, and the balance of the duties so performed to the Tower in the Elmira Yard.

Ninth: That subsequently, the plaintiff took the position with the Order of Railroad Telegraphers that the said change was of a temporary nature, because of a contemplated change of a grade crossing in the Elmira Yards eliminating the necessity of the Tower in said Yards, and upon the change of said grade crossing, the operators would [fol. 31] then be restored to the Elmira Yard office, and that the duties then being performed by the crew callers falling within the scope of the scope rule of the various agreements set out above would be restored to the telegraphers in said yard office.

Tenth: That said change of grade, above referred to, has been abandoned or has never taken place, and that said crew callers in the Elmira Yard Office have, since May 1, 1938, continued to and now perform a portion of the duties of the telegrapher operators removed from said Office, which are included within the scope of the scope rule of each of the above said agreements.

Eleventh: That at various times heretofore, since May 1, 1938, and in particular during the year 1940 when it appeared that the elimination of the grade crossing in the Elmira Yards, which would permit the elimination of the tower at said crossing would not occur, the Order of Railroad Telegraphers protested to the plaintiff the elimination of the three positions of telegrapher operators in the

Elmira Yard Office, and proceeded to process such objections or grievances, pursuant to the provisions of the Railway Labor Act, Title 45 U. S. C. A., and that said grievances have been progressed pursuant to said statute, to the chief operating officer of the plaintiff where they now rest.

Twelfth: That said chief operating officer of the plaintiff has not made a determination of said claim or grievance, pursuant to the said Railway Labor Act.

[fol. 32] Thirteenth: That it is the intention and desire of the Order of Railroad Telegraphers to progress said grievance and claim, pursuant to the said Railway Labor Act, to a conclusion.

Wherefore, the defendant, Marion J. Slocum, prays for a judgment of this Court dismissing the plaintiff's complaint, together with the costs and disbursements of this action, and for such other and further relief as may be deemed just and proper in the premises.

John F. Dwyer, Attorney for Defendant, Marion J. Slocum, Office and P. O. Address, 106 Erie County Bank Bldg., Buffalo, New York.

(Verified by Marion J. Slocum, July 14, 1944.)

Notice of Motion

(Same Title)

SIRS:

Please take notice that on the complaint, verified Answer of the defendant, Marion J. Slocum, and the verified Answer of Louis J. Carlo in the above entitled action, the defendant, Marion J. Slocum, will move this Court at a Special Term thereof to be held in the Chemung County Court House, in the City of Elmira, New York, in and for the County of Chemung, on the 5th day of February, 1945, at 10:00 o'clock in the forenoon of that day, or as soon [fol. 33] thereafter as counsel can be heard, for an order granting judgment dismissing the plaintiff's complaint herein, under Rules 112 and 113 of the Rules of Civil Practice, and such other and further relief as to the Court may

seem just and proper, together with the costs of this motion.

Dated: Buffalo, New York, January 26, 1945.

Yours, etc., John F. Dwyer, Attorney for Defendant,
Marion J. Slocum, Office and P. O. Address, 106
Eric County Bank Bldg., Buffalo 2, New York.

To Sayles, Flannery & Evans, Attorneys for Plaintiff,
Office and P. O. Address, 415 East Water Street, Elmira,
New York. Mandeville, Buck, Teeter & Harpending, At-
torneys for the Defendant, Louis J. Carlo, etc., Office and
P. O. Address, The Robinson Building, Elmira, New York.

[fol. 34] Memorandum by Newman, J.

(Same Title)

Special Term, Chemung County, February 5, 1945.

Motion by Defendant Slocum for Dismissal of Complaint.

John F. Dwyer, Esq., for the Defendant, Marion J. Slocum, for motion.

Sayles, Flannery & Evans, Esqs., for the Plaintiff, opposed.

Mandeville, Buck, Teeter & Harpending, Esqs., for the Defendant, Louis J. Carlo, opposed.

NEWMAN, J.:

The defendant Slocum now asks this Court to exercise its discretion and refuse a declaratory judgment on the ground that the questions in dispute should be decided by the National Railroad Adjustment Board.

This case has been before the courts twice before: Once before Justice Personius on an application for an order removing the case to the United States District Court, which was denied (183 Misc. 454); once on a motion to dismiss and to remand the case to this Court before Judge Knight of the United States District Court. The motion to dismiss was denied and the motion to remand the case to this Court granted (56 Fed. Supp. 634). While the precise question here involved was not decided on either of those motions, they are somewhat similar and involve some of the same arguments here advanced.

[fol. 35] Having assumed jurisdiction and having refused to relinquish it and the United States District Court having recognized the jurisdiction of this Court and remanded the action to it, we should not now decline jurisdiction unless good reason exists for so doing. Defendant contends that the procedure and relief provided by the Railway Labor Act is adequate and "If this Court should render a declaratory judgment as requested by plaintiff, it would rob the Railway Labor Act of its vitality and thwart its purpose." We fail to see how it can have any such result. In denying the motion to dismiss in Federal Court, Judge Knight said (56 Fed. Supp. at page 637): "The defendant Slocum has upon these motions submitted three extensive briefs. These are largely concerned with the necessity of recourse by the plaintiff to the Railway — Act and the effect of the failure to proceed under it on the administration of the Act. As hereinbefore pointed out, the instant action is simply one to declare the meaning of certain contracts. However worth while procedure under the Railway Labor Act may be, no law makes it compulsory and no law denies the jurisdiction of the State Court." Justice Personius in his opinion at page 456 stated: "We hold that the cause of action alleged does not come under the Railway Labor Act. The action is for a construction of the contracts between the parties. It does not arise under any law regulating commerce. It does not grow out of any disputes concerning rates of pay, rules or working conditions."

[fol. 36] "The present action involves neither the validity, construction, enforcement nor effect of the Railway Labor Act nor any Federal statute. On the contrary, it is brought solely to obtain a declaratory judgment determining the rights and obligations of the parties under written agreements. The plaintiff is seeking no rights under the Railway Labor Act. It seeks relief only under the contracts. State courts have taken jurisdiction of controversies involving working agreements, not only before the adoption of the Railway Labor Act, but since. Among numerous such cases are *Florestana v. Northern Pacific Ry. Co.*, (198 Minn. 203) and *Franklin v. Pennsylvania-Reading S. S. Lines* (122 N. J. Eq. 205).

The procedure under the Railway Labor Act seems inadequate to bind the three parties to this action."

The United States Supreme Court held in *Moore v. Ill. Central*, 312 U. S. 630, that the procedure before the Na-

tional Railroad Adjustment Board was not an exclusive remedy, that a party had the choice of resorting to a court of competent jurisdiction in the first instant. The controversy arose out of work performed at Elmira and there seems to be no reason why the plaintiff should be compelled to go to the National Railroad Adjustment Board at Chicago, with the attendant delays, especially in view of the fact that it is questionable if the relief there afforded is adequate. The condition of the court calendar here, where the controversy arose, is such that the case can be disposed of expeditiously and at the convenience of the respective parties, affording full, adequate and prompt relief.

The motion should, therefore, be denied.

Submit order accordingly.

Dated, March 22, 1945.

B. L. Newman, J. S. C.

ORDER DENYING MOTION FOR DISMISSAL OF COMPLAINT

At a Special Term of the Supreme Court held in and for the County of Chemung at the Chemung County Court House in the City of Elmira, New York on the 5th day of February, 1945.

Present: Hon. Bertram L. Newman, Justice.

(Same Title)

The above named defendant Marion J. Slocum having duly moved this Court for an order granting judgment dismissing the plaintiff's complaint herein under Rules 112 and 113 of the Rules of Civil Practice and for such other and further relief as to the Court might seem just and proper and said motion having regularly come on to be heard, now, on reading and filing the notice of motion herein dated January 26, 1945, and on the complaint, answer of the defendant Marion J. Slocum and answer of the defendant Louis J. Carlo constituting the pleadings in this action, and after hearing Mr. John F. Dwyer for the defendant Marion J. Slocum in favor of said motion, and Mr. Pierre W. Evans for the plaintiff in opposition thereto and Mr. Wilard H. McEwen and Mr. A. H. Harpending for

the defendant Louis J. Carlo in opposition thereto and due deliberation having been had, and on the written decision of the Court dated March 22, 1945, heretofore filed herein, it is on motion of Sayles, Flannery & Evans, attorneys for the plaintiff.

Ordered that said motion be and the same hereby is in all respects denied.

Enter: B. L. Newman, Justice of the Supreme Court.

OPINION TO AFFIRM

(Same Title)

Argued, May Term, 1945.

Decided, —, 1945.

Hill, P. J.; Heffernan, Brewster, Foster, Lawrence,
A. JJ.

Appeal from an order denying a motion to dismiss plaintiff's complaint under Rules 112 and 113, dated March 24, [fol. 39] 1945, and on the same day entered in the Clerk's Office of the County of Chemung.

Sayles, Flannery & Evans, attorneys for plaintiff respondent, 415 East Water St., Elmira, N. Y. (Pierre W. Evans, of counsel).

John F. Dwyer, attorney for defendant appellant, 106 Erie County Bank Building, Buffalo 2, N. Y.

HILL, P. J.

The defendant Slocum, chairman of Lackawanna Railroad Telegraphers, appeals from an order denying his motion for judgment dismissing plaintiff's complaint under Rules 112 and 113 of the Rules of Civil Practice. The plaintiff in its complaint asks for a judgment which shall declare the rights and legal relations of plaintiff and the Lackawanna Division of Railroad Telegraphers under the existing contract of collective bargaining, in so far as it relates to the work performed by three crew callers working at the station and yards of plaintiff in the City of Elmira, New York, and the rights and relations between the plaintiff and the defendant (not appealing) Lackawanna Division of Clerks, Freight Handlers, Express and Station Employees under the agreement of collective bar-

gaining between the plaintiff and that division concerning the work performed by these crew callers. A controversy exists between the plaintiff Railroad Company and defendant Unions. It arose following a decrease in the [fol. 40] number of telegraphers employed at the Elmira terminal and the addition of three crew callers to the working force. The Unions have appeared by separate attorneys, pleaded the contracts that exist, and each asks relief that the complaint be dismissed, leaving the controversy to be adjudicated under the Railway Labor Act before the National Railroad Adjustment Board at Chicago, Ill. Plaintiff-respondent asserts that the Supreme Court of New York is the most convenient forum for the trial of the issues of law concerning these three local employees of the plaintiff interstate railroad.

It has been decided that although the Railroad Labor Act permits controversies arising under employment contracts to be determined before the National Railroad Adjustment Board at Chicago, Ill., this does not deprive state courts of jurisdiction. (*Moore v. Illinois Central R. Co.*, 312 U. S. 630; 61 S. Ct. 754).

An action for a declaratory judgment may be maintained although a statutory method is provided for determining the controversy sought to be litigated. (*German Masonic Temple Ass'n v. City of New York*, 279 N. Y. 452.) A real controversy exists under the contracts. The Courts of this state furnish a more convenient forum for the trial of the issues than the statutory Board which functions in a distant state. Under such conditions, plaintiff should not be denied the right to litigate here and obtain a judgment declaratory of its obligations under the contracts. (*Rock- [fol. 41] land Light & Power Co. v. City of New York*, 289 N. Y. 45; *Woollard v. Schaffer Stores Co.*, 272 N. Y. 304).

Order affirmed with costs.

Decision

Decision handed down June 29, 1945.

142-59

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, Respondent,

v.

MARION J. SLOCUM, as General Chairman of Lackawanna Division No. 30 of the Order of Railroad Telegraphers, Appellant,

and

LOUIS J. CARLO, as General Chairman of System Board of Adjustment, Delaware, Lackawanna & Western Railroad, The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station employees, Defendant

Order affirmed with costs.

Opinion, by Hill, P. J.

All concur. o

[fol. 42] Case and Exceptions

At an Adjourned Trial and Special Term of the Supreme Court, held in and for the County of Chemung, at Supreme Court Chambers in the Court House Annex, in the City of Elmira, N. Y. This trial began at 10:00 A. M., Monday, August 6, 1945.

Present: Hon. Bertram L. Newman, Justice Presiding.

SUPREME COURT, CHEMUNG COUNTY

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, Plaintiff,

against

MARION J. SLOCUM, as General Chairman of Lackawanna Division No. 30 of the Order of Railroad Telegraphers, and Louis J. Carlo, as General Chairman of System Board of Adjustments, Delaware, Lackawanna & Western Railroad, of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, Defendants

Appearances:

For Plaintiff: Rowland L. Davis, Jr., Esq., 140 Cedar St., New York 6, N. Y. (Pierre W. Evans, Esq., of counsel.)

For Defendant Slocum: John F. Dwyer, Esq., Erie County Bank Bldg., Buffalo, N. Y., and Leo J. Hassenauer, Esq., 105 West Adams St., Chicago, Ill.

[fol. 43] For Defendant Carlo: Willard H. McEwen, Esq., 1041 Nicholas Bldg., Toledo, Ohio. (A. H. Harpending, Esq., of counsel.)

Reported by Lincoln L. Watkins, Supreme Court Stenographer, Richford, Tioga Co., N. Y.

August 6, 1945.

Supreme Court Chambers, Elmira, N. Y.

Morning session.

The above entitled case was duly moved for trial and the trial began at 10:00 o'clock A. M.

Mr. Dwyer: I would like to introduce to the Court Mr. Leo J. Hassenauer, who is a member of the Illinois Bar, admitted to practice in the United States Supreme Court.

Mr. Hassenauer is General Counsel for the Order of Railroad Telegraphers. I would like to move his admission in this court for the purpose of acting as Associate Counsel for the Defendant Slocum.

The Court: Motion granted.

Mr. Harpending: If the Court please, I would like to move the admission of Mr. Willard H. McEwen, for the

purposes of this case. I think he was already admitted in this case on a motion we had before this trial. I do not know whether that holds over or not.

The Court: I believe it does, but we can grant your motion anyhow, so there won't be any question about it. Motion granted.

Mr. Davis: Does the Court want an opening statement by the counsel?

The Court: It might be well.

[fol. 44] Plaintiff's Opening

Mr. Davis: If the Court please, this is an action brought by the Lackawanna Railroad against Marion J. Slocum, as General Chairman of the Lackawanna Division of Railroad Telegraphers, and Louis J. Carlo, as General Chairman of the System Board of the Clerks' organization. These two organizations are labor organizations which at the present time have with the Lackawanna Railroad contracts governing certain classes of employees and the working conditions of those employees.

The action is for a declaratory judgment, asking the Court to declare that work which is presently being performed by Crew Clerks or Crew Callers, which are synonymous terms, in the Elmira Yard office is work which is properly being performed by those men. The Telegraphers claim that a goodly portion of the work which these Crew Clerks are doing is work which should be performed by employees known as Telegraphers.

The situation goes back to May 1, 1938, when there was a change made at Elmira. Prior to that time there was in effect an agreement between the Telegraphers and the Lackawanna, dated January 1, 1928, which as of January 1, 1929, listed every position which the parties agreed was a position which should be filled by Telegraphers. And there were listed at that time the positions of Clerk Operators at Elmira, who were at the passenger station. There were also listed positions of Operators at the Elmira [fol. 45] Yard office, and Operator Towermen at the tower at Thurston Avenue. There were three positions listed at each point, which meant there was one man on duty for eight hours who was followed by another man; in other words, first, second, and third trick men. In the Yard Office there were also three men working in the same way, known as Crew Clerks.

As of May 1, 1938, there was a consolidation at Elmira which resulted in the jobs of the three Operators at the Yard office being abolished; the jobs of the Towermen at the tower were reclassified to Operator Towermen; and the three men at the ticket office were left as they were. The telegraphic duties of the Operators at the Yard office, such as telegrams, was transferred to the men at the station. The issuance of clearance cards and train orders, which directly govern the movement of a train from one point to another, that was transferred to the three Operator Towermen at the Thurston Avenue tower. The clerical work which the Operators had been doing, writing, was given to the Crew Callers, Crew Clerks, who were left in the Yard office.

This was not done in an arbitrary manner by the Railroad Company, but was done after a conference with the General Chairman, who is the highest official of the Telegraphers' organization, who consented to it, with the proviso that the rate of pay of the three men in the Thurston Avenue tower be increased from 71 to 74 cents. That was done. For a period of more than one year the arrangement [fol. 46] went along without any question by either of the parties. Then there came a change in the officials of the Telegraphers' organization, and the new officials evidently not being advised of the change, and that the change had been made with the consent of the previous General Chairman, filed a protest. The agreement was called to their attention, but they still were not satisfied, and there was considerable correspondence between the parties, and finally, in December, 1939, the parties discussed 18 cases, including this case at Elmira, and arrived at a settlement which was accepted by the then General Chairman, Mr. Chadwick, of the Telegraphers' organization, which was that the present arrangement was to be continued "until such time as the grade crossing program is completed, when the present Tower Operators will be transferred to the Yard office." At that time, you will probably recall, the Thurston Avenue grade crossing elimination was up and the order was issued for its elimination, which order has been postponed because of present war time conditions. So from 1939 until 1942 or 1943 that agreement was recognized by the Telegraphers.

In 1942 or 1943 there was another change in the administration of the Telegraphers' organization, and they brought

this question up again and filed a claim with the Railroad Company for a day's pay for some three unidentified men, who might have been on the extra list, for each day going back to May 1, 1938. In other words, they were asking pay for three men for doing no work.

[fol. 47] The matter was discussed with the Telegraphers. It was also discussed with the Clerks, and the Clerks took the position that the work which these Crew Clerks were performing was work which properly belonged to the Clerk's organization under the contract which was executed January 1, 1939.

In addition to the agreement of December 4, 1939, with the Telegraphers' organization, accepting settlement of this case, along with 17 or 18 others, a new agreement was negotiated, effective May 1, 1940, with the Telegraphers' organization, and again that agreement contained a list wherein every position which was claimed by the Telegraphers as of that date was set forth, giving the classification of the person, whether he was an Agent, an Agent Operator, or an Operator, the location, and then the rate of pay, and at Elmira you still had your Operator Clerks at the passenger station, and you listed only three men in the Yard, which were the three Operator Towermen in the Thurston Avenue tower, whereas in the old agreement they had been called Towermen, and in this agreement they were called Operator Towermen, which was pursuant to the agreement entered into in 1938.

The agreement contains certain rules which govern the working conditions of the employees, such as over-time, and it also contains a rule which is designated the "Scope Rule," which states that certain named employees, such as Agent Telegraphers, are to be covered by the agreement, which means that if you add any position subsequent to the date [fol. 48] of the agreement and call it an Agent Operator, that you advertise and offer the position to the Telegraphers.

I should say, that in the earlier agreement whereas there were three positions listed for the Operators at the Yard office, in this agreement there are no positions listed of Operators at the Yard office. As I understand the theory of the Telegraphers in this case, their theory is—

Mr. Dwyer: Why don't you let us explain their theory, and you explain yours?

Mr. Davis (Continuing): That if at some time messages were transmitted by telegraph, that for all future times, irrespective of how those messages are transmitted, they must be transmitted by Telegraphers to Telegraphers.

DEFENDANT SLOCUM'S OPENING

Mr. Dwyer: The Telegraphers' position in this matter, if the Court please, is simply this: they had under the 1929 agreement with the carrier the right to represent a specified class of employees. That right was not limited, that is, their representation was not limited by existing jobs, and it is very clear from the reading of the Scope Rule in the contract that it was not the intention of the parties, either in the 1929 agreement or in the 1940 agreement, to so alter their representation. Their representation was broad and covered all employees performing certain functions.

I think, and it is our position, that the so-called Schedule attached to the contract is merely a designation of the positions then in being at the time of the execution of the contract, and a designation of the rates of pay for each position. [fol. 49] I think it is quite clear, as a matter of interpretation of the contract, that in the event the carrier created another position, regardless of what he called it, if that position was performing the functions contemplated under the Telegraphers' agreement, that position was within the jurisdiction of the Telegraphers by reason of their contract.

It is our contention that in May of 1938 the three jobs of Operator at the Yard office here in Elmira were abolished by the carrier, not in contact with the Telegraphers or the Clerks, but arbitrarily abolished upon their own motion, and that the subsequent explanation given for the abolition was that it was a temporary proposition pending the grade crossing elimination spoken of by Mr. Davis.

Then the understanding was all along that at all times all functions properly within the scope of the Telegraphers agreement would be performed by the Telegraphers, and that at no times did the Telegraphers organization waive anything under their contract of 1929. And if it is claimed by the carrier here that there was any such waiver on the part of the Telegraphers, and that if they took functions away from the Telegraphers at that time and imposed those functions upon the Clerks,—that that in relation to both

agreements constituted a re-negotiation of the agreement, and that the re-negotiation of that agreement was not done pursuant to Section Six of the Railway Labor Act, which requires a thirty day's written notice of an intended change in an agreement affecting rates of pay rules or working conditions, and that this operation, if it is claimed that there was a waiver on the part of the Telegraphers, constituted a change in the rules and working conditions under the then existing contract.

Then we come along to the 1940 agreement, which contains Scope Rule somewhat broader than the Scope Rule in the 1929 agreement, and does not contemplate a giving up by the Telegraphers of anything to which they were entitled under the 1929 agreement, and again specifies only those jobs in being at the time, not as controlling but, we claim, for the purpose of establishing the rate of pay for those jobs, and that still, after the 1940 agreement, the Telegraphers are entitled to have employees in their class performing all the functions they were entitled to perform prior to May, 1938. And it will appear that all along the Telegraphers have protested to the carrier the performance by the Crew Callers in the Elmira Yard of these certain functions; and that the Road all along has done only one thing in connection with those protests, and that is, uniformly inform the Telegraphers that all operations which should be performed by Telegraphers will be performed by Telegraphers, and they have made no determination beyond that, and they have made no adjustment of the situation.

I doubt that it will develop there is a jurisdictional dispute between the Clerks and the Telegraphers. I think it will develop that the Clerks and the Telegraphers are in substantial agreement as to what functions belong to each organization and I think that it will develop that rather than [fol. 51] a dispute between the two organizations which, as the carrier claims, places it in jeopardy, we will find a situation which is of the carrier's making alone, and in which the two organizations between themselves, if they were permitted to do it, could very easily adjust.

I think that, by reason of the fact that the carrier's claim here is, in effect, that you have a re-negotiation of an agreement, which was not properly conducted under the Railway Labor Act, that it was done on a temporary basis,

that the carrier never has denied the right of the Telegraphers to represent this class of employees, and has never denied to the Telegraphers that the work properly belonging to them in the Elmira Yard office would be assigned to them, and that there is no substantial dispute between the two defendant organizations, and that the plaintiff will fail to make out a cause of action, and there will be no necessity or no propriety of the Court declaring relief by way of Declaratory Judgment.

Mr. Hassenauer: If it please the Court, if I may make a remark apropos of what Mr. Dwyer has stated,—I think before your Honor decides this case on its merits, the Court must first determine whether or not this is a justiciable controversy over which the Court has jurisdiction.

The point I desire to make is, that according to the allegations in the complaint filed here by the carrier against these two General Chairmen of the Order of Railroad Telegraphers and the Brotherhood of Railway Clerks, it obviously sets forth that a jurisdictional dispute exists between these [fol. 52] two organizations. Now there were several cases which have been recently decided by the Supreme Court of the United States, involving practically the same situation, involving other organizations, however, and other carriers, but the Supreme Court in those cases held that Congress had not intended at any time, in view of the provisions of the Railway Labor Act, that such disputes should be decided by the Courts, and held that Congress, under Section 209 of the Railway Labor Act, which we will offer to the Court shortly, had established a means whereby such disputes could be adjusted between the parties, and as a result of those decisions we submit that this being a jurisdictional dispute, it is not a justiciable matter for this Court to decide, but that this Court should recommend to the parties they should pursue the remedies set up by Congress in the Railway Labor Act, in an effort to adjust the dispute under the machinery which Congress has established since 1934, and which is still in full force and effect.

The case which I have in mind, and which we will call your Honor's attention to again, is the case of the Missouri-Kansas-Texas Railroad Company, decided by the Supreme Court of the United States, 230 U. S. Reports, and an analogous case decided at the same time, in which the Southern Pacific Railroad Company and the Brotherhood of Rail-

road Firemen and Enginemen and the Brotherhood of Locomotive Engineers were involved. Those cases, as I recall, were unanimous decisions of the Supreme Court of the [fol. 53] United States. That Court held, that since Congress has legislated on matters of that nature which we have here, the carrier and the employees involved, through their duly authorized representatives, shall be relegated to carrying out and pursuing the machinery set up by Congress in an effort to adjust such disputes; and we submit, that this being a jurisdictional dispute, a matter of which Courts have not been given any jurisdiction, this Court should deny the relief demanded, and recommend that the parties pursue the remedies set up by Congress under the Railway Labor Act.

DEFENDANT CARLO'S OPENING

Mr. McEwen: May it please the Court, appearing as a representative of the defendant Carlo and the Brotherhood of Railway Clerks, I would like to endeavor to clarify the position of the Brotherhood in this case. I use the word "endeavor" advisedly, because I never have been quite certain in my own mind that I knew just exactly what position we were supposed to occupy in reference to this litigation.

The three employees, the Crew Callers, that have been mentioned here, in the statement of plaintiff's Counsel, are members of the Brotherhood of Railroad Clerks. The work of crew calling is, as the name implies, a matter of getting in touch with members of the train crews and seeing they are informed when their respective assignments will begin, when their trains are in, when they are supposed to leave, and so forth. That work, typically throughout the country, is recognized as of a clerical nature, and Crew Callers are included in the craft of employees which is typically [fol. 54] represented by the Brotherhood of Railway Clerks. That is simply a matter of identification.

Apparently the controversy in this case is in regard to certain work, which Crew Callers are performing, which is alleged by the Telegraphers to be communications work, and communications work is, as they say, the function of Telegraphers, while clerical work is equally the function of the Brotherhood of Railway Clerks. It is perfectly apparent, it seems to me, that this case is not a simple action

seeking the judgment of this Court as to the interpretation of a contract.

The plaintiff carrier has a contract, a collective bargaining agreement with the Order of Railroad Telegraphers. Certainly no action which merely seeks the interpretation of the contract could include the Brotherhood of Railway Clerks, as a party either necessary or proper to that action. We have no part in that contract. The two organizations are wholly independent. We did not participate in the execution of it and we claim no rights thereunder. Similarly, the Railroad has a contract with the Brotherhood of Railway Clerks, and in any action which might be filed seeking the interpretation of that contract, the Order of Railroad Telegraphers is similarly not interested.

So the fact we are both brought into court here apparently, to me at least, seems to indicate that what is sought to be litigated here is the claim, the alleged claim, of the two organizations that their members should perform the same work. If that is the case, if that is the case that is made [fol. 55] on the pleadings, and if that is the case that is going to be tried here, then it is perfectly clear this is merely our old friend—I should not say friend—the old enemy of all of us in the labor field, the jurisdictional dispute.

The plaintiff is a carrier by railroad and engaged in interstate commerce. These two organizations are railroad labor organizations, with membership and contracts and relations with the railroads extending throughout the United States and Canada. They are subject to the Railway Labor Act, as Mr. Hassenauer has stated, and also as he has stated—and I do not care to elaborate on it farther than he has, the Supreme Court of the United States has held that the Railway Labor Act has occupied the jurisdictional field as far as those controversies are concerned as between railroads and railroad labor organizations, and has provided means for their adjustment by conference, mediation, and so on, and has not seen fit to entrust the decision of those cases to the Courts. The Supreme Court has clearly held that the controversies are not justiciable. To that extent, therefore, we are certainly in agreement with the order of Railroad Telegraphers.

But going further, I can't feel that the evidence is going to show, nor can I feel, that there is in existence any actual dispute. There is no jurisdictional controversy here. We are

perfectly willing that the Order of Railroad Telegraphers and its members shall perform any communications work properly so classified. We have no desire that any of our employees shall perform it; and if the work is turned over [fol. 56] so communications work is being turned over to other employees, and we have some information it is, so far as we are concerned it can be turned over to the Telegraphers tomorrow and we will make no claim on account of it.

So it seems we are here for some reason, I presume, or we would not be named parties defendant, but we have no dispute with anybody; we have no dispute with the carrier; we do not say our rights have been infringed in any way; we have filed no claim and propose to file none.

Of course it is true, if something should be done in the future, the nature of which we do not now know, which we might feel would infringe on the rights of the organization or its people, that claims would be filed, but that is subsequent. We have no claim in contemplation; we have no claim that has been filed during this lawsuit. We do not claim our rights have been infringed in any way by anybody.

We do not feel this Court has jurisdiction, and shall resist on that ground any judgment of the Court. Meanwhile, we seem to be in the role of innocent bystanders.

[fol. 57]

Plaintiff's Case

EARL B. MOFFATT, duly sworn as a witness on behalf of the Plaintiff, testified as follows:

Direct examination.

By Mr. Davis:

Q. What is your full name, Mr. Moffatt?

A. Earl B. Moffatt.

Q. Are you employed by the Delaware, Lackawanna & Western Railroad Company, the Plaintiff in this action?

A. Yes.

Q. In what capacity?

A. Assistant to the resident.

Q. How many years have you been employed by the Plaintiff?

A. Since 1906.

Q. What positions have you held with the Plaintiff, giving the approximate dates and times?

A. I held various clerical positions until 1912, when I was appointed Assistant Chief Clerk to the General Superintendent, holding that position until 1917, when I became Chief Clerk to the Vice-president in New York. I held that position until 1918, and during federal control was Assistant to the Federal Manager. After the termination of federal control I became Assistant to the Vice-president and General Manager from 1920 to 1926. I was appointed General Superintendent in August, 1926, and held that position until December 31, 1941. I was Assistant to the Vice-president during the year 1942, and since 1943 have been Assistant to the President.

[fol. 58] Q. What has been your experience in connection with the negotiation or interpretation of agreements between railroads and railroad labor organizations?

A. I have negotiated agreements with all of the transportation brotherhoods. I have also been a member and Vice-Chairman of the National Committee for the Settlement of Train Dispatchers' Disputes; and during the time I was General Superintendent I represented the Lackawanna in various wage negotiations involving the rail carriers in the United States.

(Agreement marked: Plaintiff's Exhibit 1 for identification.)

Q. I show you Plaintiff's Exhibit 1 for identification, and ask you what that is, Mr. Moffatt?

A. It is an agreement which I negotiated with M. M. Farley, then General Chairman of the Telegraphers, and his General Committee, which lists on pages 15 to 34—

Mr. Dwyer: Let's not go into what it does now. Let us get it in first.

Q. Does that agreement list any positions?

A. On pages 15 to 31 it lists all the positions—

Mr. Dwyer: Are you going to put it in evidence? If so, I won't have any objection.

Mr. Davis: Yes.

A. (Continuing:) It lists all the positions covered by the agreement.

Mr. Dwyer: I ask that be stricken out as a conclusion.

The Court: Strike it out.

Mr. Dwyer: The contract is not in evidence. The contract itself is the best evidence of what it does. I object to any further testimony concerning it.

Q. Did you conduct any negotiations in connection with that contract?

A. I did.

Q. Did you discuss with the representatives of the Telegraphers' organization, during the negotiation of that contract, certain positions?

A. I did.

Q. Does that contract cover all the positions which were occupied by the Telegraphers at the time it was executed?

Mr. Dwyer: I object to that. The contract itself is the best evidence of what it does, and it is not in evidence.

Mr. Davis: If the Court please, this man was General Superintendent at the time of the execution of this agreement, and he knew what positions were occupied by Telegraphers on the Lackawanna Railroad. I do not see how the Court in looking at that contract could tell whether or not all the positions on the railroad were covered by it.

The Court: Overruled.

Mr. Dwyer: Exception.

Mr. Davis: Will you read the question?

Q. (Read by Reporter:) Does that contract cover all the positions which were occupied by the Telegraphers at the time it was executed?

A. The contract covers all positions which were negotiated into the contract and which the Telegraphers represented, as of January 1, 1929, and the Scope Rule specifically provides that it covers those as shown in the Rate Schedule.

Mr. Dwyer: If the Court please, I object to that, and I ask the answer be stricken out. It is this witness's interpretation of the contract, the subject matter of this litigation, and he is incompetent to testify as such.

Mr. Davis: I think, if the Court please, I have shown Mr. Moffatt has had quite some experience as to railroad agreements and I think he is qualified as an expert witness.

The Court: Overruled.

Mr. Dwyer: Exception.

Mr. Davis: I offer the contract in evidence.

Mr. Dwyer: No objection.

The Court: Received.

(Agreement received and marked: Plaintiff's Exhibit No. 1.)

By Mr. Davis (Continuing):

Q. I show you Plaintiff's Exhibit 1, and I ask you if that contains certain rules?

A. It does.

Q. What is the purpose of those rules?

A. The purpose of the rules is to provide the basis—

Mr. Dwyer: I object to that question, if the Court please, as immaterial, and this witness is incompetent to give his opinion as to what is contained in the contract.

The Court: Overruled.

Mr. Dwyer: Exception.

[fol 61] A. It provides a basis for the hours of work constituting a day; it provides for the rates of pay; it provides for seniority and promotion,—and certain other rules governing the employees covered in the agreement in their work from day to day.

Q. Is Exhibit 1 the same as Exhibit A attached to the complaint?

A. It is.

Q. Does Exhibit 1 list any positions at Elmira?

A. It does. On page 25 it lists three Clerk Operators at the passenger station, the three Operators at the Yard office, and three Towermen at the Lehigh Valley tower.

Q. Are those positions the only ones at Elmira covered by Exhibit 1?

Mr. Dwyer: I object to that as calling for a conclusion, a legal conclusion.

The Court: Overruled.

Mr. Dwyer: Exception.

A. They are.

Q. How long was Exhibit 1 effective?

A. From January 1, 1929, to May 1, 1940.

Q. Does this Exhibit also set forth the rates of pay for each of the positions at Elmira?

A. It does. It sets forth the then existing rates.

Q. There were increases subsequent to the time the agreement was negotiated?

A. That is correct.

Q. Where were the Clerk Operators located?

A. At the Elmira passenger station.

Q. What type of work did they perform?

A. They performed the work of Ticket Clerks and Telegraphers. Part of the work which they did and are doing [fol. 62] now is that work,—and done by straight Ticket Clerks at other points.

Q. Straight Ticket Clerks are covered by the Clerk's agreement?

A. Yes.

Q. Are Ticket Clerks covered by the Telegraphers' agreement?

A. They are not.

Q. Where were the Operators located?

A. They were in the Yard office, known as M-S, which was the telegraph call for that station.

Q. You mean the letters M and S?

A. That is right.

Q. What were the duties of the Operators?

A. They performed railroad telegraphic work, certain telephone work, and any other duties assigned to them by the Yardmaster or the Chief Clerk of the office.

Q. Where were the Towermen located?

A. They were located in the tower known as the Lehigh Valley tower at Thurston Street.

Q. What were their duties?

A. They had certain telegraphic duties, also throwing levers, throwing switches and signals, and they also operated the crossing gates at Thurston Street.

Q. Are Crossing Gatemen covered by the Telegraphers' agreement?

A. No; they are covered by the Maintenance of Way agreement.

Mr. Dwyer: I am sorry I missed the last answer?

The Witness: I said they are not specifically covered; that Crossing Watchmen are covered by the Maintenance of Way agreement.

Q. I call your attention to Rule 1, Exhibit 1, and ask you to explain to the Court what in your dealings with the

[fol. 63] Telegraphers has been the generally accepted meaning of the words "Telegraphers", "Telephone Operators", "Agent Telegraphers", and "Agent Telephone Operators"?

Mr. Dwyer: I object to that question on the ground it calls for a conclusion on the part of this witness.

The Court: Overruled.

Mr. Dwyer: Exception.

A. Generally, "Telegraphers" are employees occupying positions listed in the agreement as "Operators" who handle train orders, clearance cards, and messages by telegraph.

Q. May I interrupt you and ask you to explain to the Court what you mean by a "Train Order"?

A. A train order is issued by a Dispatcher to an Operator or Telegrapher for transmission to a Crew, which gives them the right of track in movement of the train as against other trains which may be on the railroad. And a "Clearance Card" is a card which is given with the order, indicating that so far as the Operator is concerned there are no further orders to be given to the Crew before they start on their trip, giving them the right to have the track.

Q. The train can't move without receiving messages of that type, is that right?

A. As a general rule; yes, sir. There are certain exceptions. "Agent Telegraphers" are those who occupy the positions listed in the agreement as "Agent Operators". They also handle train orders, clearance cards, messages, [fol. 64] either by telegraph or telephone. They sell tickets, bill freight; they clean up the station building; they handle station correspondence, or do any other work necessary in the operation of the station.

"Telephone Operators" generally are those. They do not want to be confused with "Switchboard Operators." They are employees occupying the positions listed as "Operators" or "Agent Operators", who take and transmit messages by telephone rather than by telegraph. They are not Morse men for the most part.

And "Agent Telegraphers" or "Telephoners" are practically doing the same work, except that the work they perform is done over the telephone instead of over the telegraph. They also perform any work in connection with

the operation of their station, whether it is clerical or any other work of that character.

Q. Do you have any rule on the Lackawanna Railroad covering Telephone and Telegraph Operators?

A. Yes, sir, in the Book of Rules: Rules 740 to 750 B. They have been in effect for many years.

Q. Are these the rules of the Operating Department?

A. That is right.

Q. I show you a red book and ask you if that is the Book of Rules?

A. That is the Book of Rules, and the particular rules applicable to Telegraphers, Agents, and so forth, are covered on pages 118, 119, 120, 121 and 122.

Mr. Davis: I offer that in evidence.

Mr. Dwyer: I will object to it.

Mr. Evans: Have you had it marked for Identification? [fol. 65] (Book of rules marked: Plaintiff's Exhibit No. 2 for Identification.)

Mr. Davis: I offer Exhibit 2 for Identification, pages 118 to 122, inclusive.

Mr. Dwyer: No objection.

The Court: Received.

(Book of Rules received and marked: Plaintiff's Exhibit No. 2.)

Q. I notice in those rules the word "Signalmen" is used. What do you mean by "Signalmen"?

A. Usually "Towermen" and "Levellers."

Q. Does this book also contain a blank form of clearance card and train order?

A. It does.

Q. On what pages are those?

A. Clearance Form A on page 84; Clearance Form B on page 85; and sample train orders are shown on pages 86 and 87.

Mr. Davis: I think for the information of the Court I will offer those pages also.

Mr. Dwyer: No objection.

The Court: Received.

Mr. Evans: Why not take them as part of the same exhibit.

The Court: Pages 84 to 87 received as part of Exhibit 2.

(Pages 84 to 87 of Book of Rules received as part of Exhibit 2.)

Q. Mr. Moffatt, you were familiar, were you, as General Superintendent, with the type of work done by employees along the Lackawanna Railroad?

A. Generally; yes, sir.

Q. And as of January 1, 1929, were there on the Lackawanna any Agents, whose positions were not listed in Ex-
[fol. 66] hibit 1, who were performing work as you have described for this position and who were not listed in Exhibit 1?

A. There were.

Q. How long were Operators to your knowledge employed at the Elmira Yard office?

A. They were employed here, I think, when I first started with the railroad in 1906; and they were employed until May 1, 1938, when they were discontinued and their positions abolished.

Q. How long were Towermen employed at the Lehigh Valley tower, to your knowledge?

A. From 1906 until May 1, 1938, when the positions were reclassified.

Q. How long have Clerk Operators been employed at the Elmira passenger station, to your knowledge?

A. I believe since 1906.

Q. What work did the Operators at the Elmira Yard Office perform prior to May 1, 1938?

A. They received and transmitted telegrams; they reported trains; they worked with the Dispatchers; and handled any other work given them by the Yardmaster or Chief Clerk in charge of the office. The messages were transmitted either by telephone or telegraph, as a rule.

Q. Is there anything in Exhibit 1 which says that a person occupying a position listed therein can or cannot take or give information by telephone?

Mr. Dwyer: I object to that as calling for a conclusion by this witness.

The Court: Overruled.

Mr. Dwyer: Exception.

[fol. 67] A. There is not. The exhibit has no rule whatsoever which defines the work to be performed.

Mr. Dwyer: I object to any further discussion. The question has been answered. The witness is now stating his opinion. I ask the last part of the answer be stricken out.

The Court: Strike it out.

Q. Is there any work in Exhibit 1 which defines what is Telegraphers' work?

A. There is not.

Q. Does Exhibit 1 cover positions?

A. It does.

Mr. Dwyer: I object to that and ask to have it stricken out. That is the meat of this lawsuit, and is the conclusion of the witness on this proposition. It certainly is not competent.

The Court: Overruled.

Mr. Dwyer: Exception.

A. Is there anything in Exhibit 1 which says that Crew Callers cannot take or give general information by telephone?

Mr. Dwyer: I object to that. That is also the opinion of the witness. I submit the contents of the contract is the only evidence that is competent in that fashion.

The Court: Overruled.

Mr. Dwyer: Exception.

A. There is not.

Q. At the Elmira Yard office there are also "Crew Callers" or "Crew Clerks", as it is called?

A. That is right.

[fol. 68]. Q. How long have they been there?

A. Since I came with the railroad in 1906.

Q. Were these Crew Callers employed there both prior to and subsequent to May 1, 1938?

A. They were.

Q. How many were employed?

A. Three men: one on each track.

Q. Prior to May 1, 1938, did you on occasion call up the Crew Callers and get information from them?

A. Yes. I called up not only Crew Callers at Elmira but Crew Callers or any other employees on the railroad from whom I wanted information.

Q. What would be the type of information you would get from these men?

Mr. Dwyer: I object to that. I can't see that is material to this lawsuit.

The Court: Overruled.

Mr. Dwyer: Exception.

A. Anything pertaining to the Yard information, or train movements through the Yard.

Mr. Dwyer: If the Court please, I might point out at this time that this man is a supervisory employee of the railroad, or was at that time, and now is an official of the railroad. I assume he can call anybody all the way along the line, regardless of their position on the railroad, and get whatever information he desires from them so long as it is within their knowledge. That certainly has nothing whatever to do with the interpretation of the contract between the railroad and these two defendants. It does [fol. 69] not impose any burden upon the employees. It does not establish the functioning of the employees. It is entirely superfluous and incompetent, so far as this lawsuit is concerned.

The Court: Overruled.

Mr. Dwyer: Exception.

Q. Were Crew Callers covered by any agreement, Mr. Moffat?

A. Not prior to October 1, 1934.

(Agreement relating to Clerical Forces marked: Plaintiff's Exhibit 3 for Identification).

Q. I show you Exhibit 3 for Identification, Mr. Moffatt, and ask you what that is?

A. That is an agreement which I negotiated with the General Chairman and members of the General Committee of the Association of Clerical Forces on the Lackawanna Railroad, covering rules governing their working conditions for the employees covered thereby.

Q. Is that Exhibit C attached to the complaint?

A. That is right.

Mr. Dwyer: We do not have a copy of that, Mr. Davis. Have you an extra copy that we might have?

Mr. Davis: I do not believe I have.

Mr. Dwyer: I would like to be able to look at it as you are going along.

Mr. Harpending: Maybe I can let you take mine.

Mr. Dwyer: The Court has furnished me with a copy. [fol. 70] Mr. Davis: There was a copy attached to your copy of the complaint.

Mr. Dwyer: That is right.

By Mr. Davis (Continuing):

Q. Does Exhibit 3 for Identification cover the three Crew Callers at the Elmira Yard office?

A. It did.

Mr. Dwyer: I object to that as not binding upon the defendant Slocum and the organization represented by him. We are not a party to the contract, and know nothing about its negotiation. Any discussion of that contract certainly cannot be binding upon us. In so far as the defendant I represent cannot be bound by it, I object to any discussion of it.

Mr. Davis: I think it becomes important in this case that the Court should have all these contracts before it.

Mr. Dwyer: I do not object to the contract going in, but I object to any further questioning as to what it contains or what it means.

The Court: Overruled.

Mr. Dwyer: Exception.

Mr. Davis: I offer the contract in evidence.

Mr. Dwyer: I have no objection to that.

The Court: Received.

(Agreement with Clerks received and marked Plaintiff's Exhibit No. 3).

Q. You worked under this Exhibit 3 for some time, Mr. Moffatt?

A. Yes, until that was superseded by another contract [fol. 71] with the Brotherhood of Railway and Steamship Clerks.

Q. Is there anything in Exhibit 3 which in your opinion limits the extent of general information or recorded data that a Crew Caller may take or give by telephone?

Mr. Dwyer: I object to that as strictly a conclusion of this witness, and as not competent.

The Court: Overruled.

Mr. Dwyer: Exception.

A. There is not.

Mr. Dwyer: I further object on the ground it is not binding on the Defendant Slocum.

The Court: Overruled.

Mr. Dwyer: Exception.

Q. Mr. Moffatt, did there come a time when General Chairman Farley died?

A. Yes. He died, I believe, in the early summer of 1934.

Q. Who succeeded Mr. Farley?

A. General Chairman Voss.

Q. Do you recall when that was?

A. I believe it was in August of 1934.

Q. Subsequent to January 1, 1929, were there any changes made in the positions listed in Exhibit 4, which is the Telegraphers' agreement?

A. Yes, there were. Some positions were added and some were discontinued.

Q. What was the procedure for adding or removing positions from the list contained in Exhibit 1?

A. Any time when the work of a position was of such a nature that it wasn't any longer necessary, the position [fol. 72] was abolished. When a new position was required, it was put on and added to the Schedule, and certain positions from time to time were added, which prior to the agreement itself had been classed as Supervisory jobs. They were changed and put into the agreement at the request of the employees and concurrence of management.

Q. And for the benefit of the Court would you explain what you mean by a "Supervisory position"?

A. Generally a Supervisory position is one where an Agent may have from one to twenty-five men working under his immediate jurisdiction, or maybe more. And generally his duties are of a supervisory nature in supervising the work performed by the individual man.

Q. Was there any thirty day notice served in connection with these Supervisory positions which the organization wished added to the Schedule?

A. In most cases I would say no. The usual procedure was for the General Chairman and the Committee to come

in in connection with certain matters under discussion, and they might ask for the inclusion in the Schedule of maybe 15 to 25 jobs, and we might agree upon five or six, and sometimes more, and include them in the Schedule from that time on, which naturally when that was done gave the Telegraphers that many more jobs for the men whom they represented.

Q. In the case of a new position, how did you determine whether or not that was to be added to the Telegraphers' agreement?

A. Whenever a new position was necessary at the station, the Superintendent or sometimes I would ask the [fol. 73] Agent what he would rather have, whether he would rather have another Clerk or whether he would rather have an Operator, and he would tell me or tell us which would be the most help to him, and we would authorize whatever he wanted if we thought that it was required.

Q. Did there come a time, Mr. Moffatt, when certain changes were made in the positions in the Elmira Yard office and in the Lehigh Valley tower?

Mr. Hassenauer: Your Honor, I would like to ask Mr. Davis a question here. (To Mr. Davis): Is it your position that this mandatory notice provided in Section Six of the Railway Labor Act does not apply to changes in Supervisory positions?

Mr. Davis: I do not see why I should answer that question.

Mr. Hassenauer: You do not have to answer it. I am just asking it, and if you do not say anything, all right. I want to get your position clear on that.

Mr. Davis: I think our position will develop as we go along.

The Court: Read the question.

Q. (Read by Reporter) Did there come a time, Mr. Moffatt, when certain changes were made in the positions in the Elmira Yard office and in the Lehigh Valley tower?

A. Yes.

Q. When was that?

A. May 1, 1938.

Q. What changes were made, Mr. Moffatt?

A. The positions of three Operators at the Yard office were abolished, and also the positions of those three

[fol. 74] straight Towermen at the Lehigh Valley tower were abolished. Three new positions of Operator-Towermen at Lehigh Valley tower were created. All recognized Telegraphers' work, such as messages—

Mr. Dwyer: Just a moment. I object to the use of the word "recognized" in connection with this testimony. It is surely a conclusion of the witness, and is not competent.

— Mr. Evans: He is defining it now.

Mr. Dwyer: I object to the use of the word "recognized."

The Court: We will strike out the word "recognized," if you wish.

A. (Continuing:) Then I will say the Telegraphers work: such as messages, train orders, clearance cards, and so forth, was transferred to the three Operator Towermen at the Lehigh Valley tower, and also to the three Clerk Operators at the passenger station.

Q. Do you recognize, Mr. Moffatt, in your dealings with the Telegraphers' organization, that the transmission of messages by Morse code, and by the Agents of train orders and clearance cards, is Telegraphers' work?

A. It is generally so recognized.

Q. Why were these changes made, Mr. Moffatt?

Mr. Dwyer: I object to that, I do not think it is competent.

The Court: Overruled.

Mr. Dwyer: Exception.

[fol. 75] A. They were for the purpose of effecting economies, because there were twelve positions here at Elmira with scarcely work enough for nine men.

Q. Were the telegraph instruments taken out of the Yard office?

A. They were.

Q. What happened to the three Crew Callers in the Yard office?

A. They were left in the Yard office.

Q. Prior to the time you made this change did you discuss it with any official of the Telegraphers?

A. Yes; I discussed it with General Chairman Voss.

Q. Is he still alive?

A. Yes, sir, he lives in New Jersey.

Q. About when did you have that discussion with General Chairman Voss of the Telegraphers?

A. During April of 1938 before the change was authorized.

Q. What did General Chairman Voss say in connection with the change?

Mr. Dwyer: I object to that, if the Court please, as not binding upon the organization.

Mr. Davis: He was General Chairman of the Telegraphers' organization.

Mr. Dwyer: Show us his authority before the conversation is put in here.

The Court: Overruled.

Mr. Dwyer: Exception.

A. Mr. Voss said he would concur in the change, providing we gave the Operator Towermen the Operators' rate of 74 cents rather than the Towermen's rate of 71 cents.

[fol. 76] Q. Did you give the Operator Towermen the 74 cent rate?

A. We did.

Q. And did General Chairman Voss make any objection to the Crew Callers performing telephone work?

Mr. Dwyer: I object to that, if the Court please. I object to the form of the question.

The Court: Overruled.

Mr. Davis: Exception.

A. He made no objection whatever to me.

Q. Did you confirm your understanding with General Chairman Voss by any letter?

A. I did, by a letter dated April 30, 1938.

(Letter marked: Plaintiff's Exhibit No. 4 for Identification.)

Q. I show you Plaintiff's Exhibit 4 for Identification, and ask you what that is?

A. This is a carbon copy of a letter sent by me to the Superintendent of the Buffalo Division on April 30, 1938, in which—

Mr. Dwyer: I object to his reading it.

Q. Was a copy of that sent to Mr. Voss?

A. A copy was sent to Mr. Voss.

Q. Did you receive any reply from Mr. Voss?

A. Not to my knowledge.

Mr. Davis: I offer it in evidence.

Mr. Dwyer: I object to it as a self-serving declaration, and incompetent.

Mr. Davis: Have you got the original?

Mr. Hassenauer: He did not testify he sent the original to Mr. Voss.

[fol. 77] Mr. Dwyer: Is it in your notice to produce?

Mr. Davis: Yes, sir.

Mr. Dwyer: Is that the first item on the notice?

Mr. Davis: Yes, sir.

Mr. Dwyer: I do not have it.

The Court: Objection overruled, received.

Mr. Dwyer: Exception.

(Letter received and marked: Plaintiff's Exhibit No. 4.)

Q. Subsequent to April 30, 1938, did General Chairman Voss of the Telegraphers make any protest to you in regard to the change that was made at Elmira?

A. He did not.

Q. Do you know how long General Chairman Voss was in office after April 30, 1938?

A. I think he was in office until June, 1939.

Q. When was the Brotherhood of Railway Clerks certified as the bargaining agent on the Lackawanna Railroad?

A. October 12, 1937.

Q. Whom did the certification cover?

A: It covered the employees mentioned in the certification.

(Certificate marked: Plaintiff's Exhibit No. 5 for Identification.)

Q. I show you Plaintiff's Exhibit 5 for Identification, and ask you if that is a certification by the Mediation Board of the Clerks' organization as bargaining agent on the Lackawanna Railroad?

A. That is it.

Q. That shows the employees that are covered by the certification?

A. Yes; it covers clerical, office, station, clerical plat-[fol. 78] form, and storehouse employees.

Mr. Davis: I offer Exhibit 5 for Identification in evidence.

Mr. Dwyer: No objection.

The Court: Received.

(Certificate, received and marked: Plaintiff's Exhibit No. 5.)

Q. Was Exhibit 3, the agreement with the Lackawanna Association of Clerks, continued after the certification?

A. It was continued until a new agreement was made with the Brotherhood of Railroad Clerks, which became effective in 1939.

(Agreement with Clerks, effective January 1, 1939, marked: Plaintiff's Exhibit No. 6 for Identification.)

Q. I show you Exhibit 6 for Identification, and ask you what that is, Mr. Moffatt?

A. This is an agreement between the Railroad Company and the Brotherhood of Railway and Steamship Clerks, which was negotiated by me with their duly authorized representatives, which contain rules governing working conditions, and which became effective January 1, 1939.

Q. And is Exhibit 6 for Identification the same as Exhibit D attached to the complaint?

A. That is right.

Q. And does Exhibit 6 for Identification cover Crew Callers at the Elmira Yard?

A. It does.

Mr. Davis: I offer Exhibit 6 for Identification in evidence.

Mr. Dwyer: I object to it as not binding upon the defendant Slocum.

[fol. 79] The Court: Overruled; received.

Mr. Dwyer: Exception.

(Agreement with Clerks received and marked: Plaintiff's Exhibit No. 6.)

Q. Did there come a time when the Telegraphers first made a protest involving the work performed by Crew Callers at the Elmira Yard office?

A. Yes, sir.

Q. When was that first protest made?

A. The first one we have a record of is a complaint made by local Chairman West to Superintendent Alexander on August 1, 1939.

Q. That was after former General Chairman Voss had gotten out as General Chairman?

A. I believe it was.

Q. Was this protest brought to your attention by Superintendent Alexander?

A. It was.

Q. Did you advise Superintendent Alexander what reply to make?

A. Yes, sir; I did.

Q. When did Superintendent Alexander reply to Mr. West, as you recall?

A. On August 11, 1939.

Mr. Dwyer: I have the original of that.

Mr. Davis: I ask to have this marked.

(Letter, Mr. Alexander to Mr. West, of August 11, 1939, marked: Plaintiff's Exhibit No. 7 for Identification.)

Mr. Davis: I offer Exhibit 7 for Identification in evidence.

Mr. Dwyer: No objection.

The Court: Received.

(Letter received and marked: Plaintiff's Exhibit No. 7.)

[fol. 80] Mr. Dwyer: Do you want this any longer, Mr. Davis?

Mr. Davis: No.

Mr. Dwyer: Does your Honor wish to see it? (Exhibit 7 passed to Court.)

Q. Was this protest or claim subsequently handed to you?

A. Yes, sir; it was.

Q. When was that?

A. On August 17, 1939. I discussed eight cases with General Chairman Chadwick. This particular case was No. 7. My memorandum made at the time shows that.

Mr. Dwyer: I object to that.

Q. What advice did you give Mr. Chadwick in connection with this matter at the time you discussed it with him?

A. I told him I had approved of Superintendent Alexander's reply to Mr. West's communication.

Q. That was the letter of August 11, 1939?

A. That is right.

Q. Did you say anything else about your position in connection with this claim?

A. Yes. I told him, furthermore, that General Chairman Voss had concurred in it, and that it included giving a 74 rate to the Towermen, and we were going to stand upon the agreement we had made.

Q. That 74 rate was a three cent increase, is that right?

A. Yes, three cents per hour.

Q. During that period from 1938 to August 1, 1939, who was local Chairman of the Telegraphers on the Buffalo Division?

A. Mr. West, I believe.

Q. Where was he situated?

A. He was working at the East Buffalo Yard office.

Q. In the course of his duties would he be talking with the Crew Callers?

A. Yes.

[fol. 81] Q. So he would know of the situation at the Elmira office and know of the change made August 1, 1938?

A. Absolutely. Part of his duties was to be on the Dispatcher's wire, and naturally he would know what was going on not only at Elmira but all the way from Elmira to East Buffalo.

Q. And was Mr. West as local Chairman the person who institutes claims on behalf of the Telegraphers under their contract?

Mr. Dwyer: I object to that.

Q. You have handled a lot of claims, haven't you?

The Court: Overruled.

Mr. Dwyer: Exception.

A. Mr. West is the authorized local Chairman of the Telegraphers' local organization. The grievances are instituted in a good many ways; either by the employee directly concerned, or if he puts it in the hands of a local Chairman it may be handled by the local Chairman with the Superintendent, or might be handled by the General Chairman with me, or with the General Superintendent,—put it that way.

Q. After you had your conference with General Chairman Chadwick on August 17, 1939, what was the next step taken in connection with this case?

A. Do you mean after I had the conference with him?

Q. Yes, after your August 17th conference?

A. He wrote me a letter, dated September 4, 1939.

Q. Did you reply to that letter?

A. I replied to it on September 5th.

[fol. 82] Q. Was the claim progressed any further?

A. Yes, on October 13th General Chairman Chadwick wrote me he and his General Committee wanted to discuss several cases with me, very much of which covered the Elmira Yard office.

Q. When did you meet with General Chairman Chadwick and his Committee?

A. I met them November 9, 1939, at 9:00 A. M., in my office at Scranton.

Q. Who was present at that meeting?

A. General Chairman Chadwick and his Committee, consisting of Messrs. Kelly, Boehmer, and West.

Q. What happened at that meeting?

A. We discussed 17 different cases, and I submitted to Mr. Chadwick and his Committee a proposed settlement of all 17 cases. No. 7 involved the Elmira Yard office, and the proposition was that the request was to be withdrawn, and if any work then being performed in the Yard office was objectionable, we would transfer it to the Operator in the Lehigh Valley tower.

Q. Did you get an answer from General Chairman Chadwick and his Committee to your proposed settlement of these cases?

A. Yes; I received a letter from him, dated November 16, 1939.

Q. Did you reply to that letter?

A. Yes; on December 2, 1939, I replied, at which time I gave him answers to each of the 17 cases.

(Letter of December 2, 1939, Mr. Moffatt to Mr. Chadwick, marked: Plaintiff's Exhibit No. 8 for Identification.)

Q. I show you Exhibit 8 for Identification, and ask you if that is the letter which you wrote to General Chairman [fol. 83] Chadwick on December 2, 1939, in connection with the settlement of 18 cases?

A. That is right.

Mr. Davis: I offer it in evidence.

Mr. Dwyer: No objection.

The Court: Received.

(Letter received and marked: Plaintiff's Exhibit No. 8.)

Q. And on page 2, Case No. 7 is the Elmira Yard case?

A. Yes. In connection with the Elmira Yard case I agreed that the present arrangement would be continued until such time as the grade crossing project was completed, at which time the Operators then in the tower would be transferred to the Yard office. This change was part of the settlement of the 17 cases which were under consideration.

Mr. Dwyer: When did you say Chadwick replied to that letter?

Mr. Davis: I haven't got that far yet.

Mr. Dwyer: It is going to be December 4th, I think.

Q. Did you get a reply from Mr. Chadwick to your letter of December 2nd?

A. Yes, sir; I got a letter, dated December 4, 1939.

(Letter, Mr. Chadwick to Mr. Moffatt, dated December 4, 1939, marked: Plaintiff's Exhibit No. 9 for Identification.)

Q. I show you Plaintiff's Exhibit 9 for Identification, and ask you if that is the letter which you received from Mr. Chadwick?

A. It is.

Q. That is in reply to your letter of December 2nd?

A. It is; that is right.

Mr. Davis: I offer Exhibit 9 for Identification in evidence.

[fol. 84] Mr. Dwyer: No objection.

The Court: Received.

(Letter received and marked: Plaintiff's Exhibit No. 9.)

Q. Did there come a time, Mr. Moffatt, when the Telegraphers' agreement was changed?

A. Yes sir. On January 12, 1940, General Chairman Chadwick gave me notice of opening up the old agreement.

Q. Did you conduct the negotiations on behalf of the Railroad Company for the new agreement with the Telegraphers?

A. I did.

Q. With what representatives of the Telegraphers?

A. With Mr. Chadwick, the General Chairman; with his local Chairman; and also with Vice-President D. C. Lewis of the Telegraphers, who was present part of the time, until he took sick and subsequently died.

Q. The local Chairmen were West, Kelly, and Boehmer?

A. My recollection is those were the three gentlemen.

(Rules relating to Telegraphers marked: Plaintiff's Exhibit No. 10 for Identification.)

Q. I show you Exhibit 10 for Identification, and ask you what that is?

A. That is the agreement which I negotiated with General Chairman Chadwick and his Committee covering the rules and working conditions and rates of pay for employees shown in the Rate Schedule.

Q. Does that agreement cover all positions in the Lackawanna Railroad as of the date of the agreement?

A. It covers all the positions for which the Telegraphers were negotiating rules, working conditions, and rates.

[fol. 85] Mr. Dwyer: I object to that. That is definitely a conclusion of the witness, and he is not competent to testify to it. The conclusion must rest upon the actual negotiations and conversations resulting in the contract.

Mr. Davis: He has already testified he handled the negotiations, and he has named the men he handled the negotiations with.

Mr. Dwyer: That does not entitle him or give his conclusions as to what occurred.

The Court: Overruled.

Mr. Dwyer: Exception.

Mr. Davis: I offer Exhibit 10 for Identification.

(Agreement relating to rules, working conditions and rates received and marked Plaintiff's Exhibit No. 10.)

Mr. Dwyer: What is the date of that agreement?

Mr. Davis: May 1, 1940.

Mr. Evans: Is that the same as some exhibit in the complaint?

By Mr. Davis (Continuing):

Q. Is Exhibit 10 the same as Exhibit B attached to the complaint?

A. It is.

Mr. Dwyer: Might I suggest we do something about keeping these exhibits together and in order, so we will know where they are? I am going to be fog-bound before long.

Mr. Davis: We will put them on the Judge's desk.

[fol. 86] Q. In connection with your negotiations for Exhibit 10, did you have any conversations with the General Chairman and his Committee and Vice-president Lewis, as to what positions should be listed in that agreement?

A. Yes. They knew, of course, —

Mr. Dwyer: I object to what they knew. That is for them to testify to.

The Court: Sustained.

A. (Continuing) Well, then, I knew and they knew —

Mr. Dwyer: I object to that again.

A. (Continuing) I knew what positions were covered that were listed in the former agreements which were still in existence. I also knew what positions had been abolished since the former agreement. And also I knew what positions had been added since January 1, 1929. And before the agreement, Exhibit 10, was printed, a list of all the positions to be covered by it was submitted to the employees to check and approve.

Mr. Dwyer: Let me interrupt here. I object to the witness's statement that everything which was to be covered by the agreement was printed in the agreement. I think that definitely is a conclusion which he reaches in his own mind as to the result of a negotiation. I think we are entitled to all the conversations upon which he bases that conclusion.

Q. Let me ask you this question: Did you submit a type-written list of positions to the employees before this agreement was negotiated?

A. I did, for check and approval.

[fol. 87] Q. Did they approve that list?

Mr. Dwyer: I object to that as calling for a conclusion.

A. I beg your pardon; you said, in your question, "before the agreement was negotiated"?

Q. While you were negotiating your agreement?

A. The list was submitted before the agreement which had been agreed upon was printed, so there would be no possible error.

Q. Did the Telegraphers, General Chairman Chadwick and his Committee, O. K. this typewritten list before it was printed?

A. They did.

Mr. Dwyer: I object to the form of the question, and ask to have the answer stricken out, as calling for a conclusion.

The Court: Objection sustained; strike it out.

Q. What did they do to indicate their approval of the list?

A. My recollection is they conferred with Mr. Rogers of my office and checked the entire list.

Mr. Dwyer: Were you there when they did that?

The Witness: No.

Mr. Dwyer: I ask to have it stricken out.

Q. Did the list come back in your possession?

A. Yes. It came back into my possession, and I never had any statement from the Telegraphers that any position was omitted.

Mr. Dwyer: I object to that and move to have it stricken out.

The Court: Denied.

Mr. Dwyer: Exception.

[fol. 88] Q. Since May 1, 1940, has there been any changes in the positions listed in the May 1st agreement?

A. Yes; certain positions have been added and others have been abolished.

Q. Does Exhibit 10 list any positions in Elmira?

A. Yes, sir; it does.

Q. What positions in Elmira are listed in Exhibit 10?

A. The Operator Clerks in all three positions at the passenger station, and the Operator Towermen in all three tracks at the Yard.

Q. What rate of pay is shown of the Towermen in Exhibit 10?

A. 74 cents per hour.

Q. Are those the only positions at Elmira which are listed in Exhibit 10?

A: They are.

Q. In your opinion, Mr. Moffatt, does Exhibit 10 cover any positions which are not listed therein?

Mr. Dwyer: I object to that. This man is not an expert in labor relations or railroad law. He is a Supervisory employee of the Company, and he certainly cannot testify to give his opinion as to the construction of a contract which is the subject matter of this litigation. That is all he has done all through this testimony. We haven't had facts, we have had opinions. It certainly is not competent to prove anything except what this man thinks about it.

Mr. Davis: I think, if the Court please, when Mr. Moffatt first went on the stand he stated he had not ~~only~~ negotiated these agreements but had handled other agreements for them for the last 10 or 15 years.

[fol. 89] Mr. Dwyer: That does not make him an expert to construe this contract.

Mr. Davis: He has been on the Dispatchers' Committee. I think he is thoroughly qualified as an expert witness.

Mr. Dwyer: I never before have been into a contract action where a witness testified what the subject matter meant. The Court always decides on that.

The Court: Overruled.

Mr. Dwyer: Exception. We haven't had any facts yet on which to base anything. Everything has been the opinion of this witness.

The Court: Read the question.

Q. (Read by Reporter:) In your opinion, Mr. Moffatt, does Exhibit 10 cover any positions which are not listed therein?

A. It does not.

Mr. Dwyer: I move to strike the answer out as totally incompetent.

The Court: Denied.

Mr. Dwyer: Exception.

Q. Do you know whether President Gardner of the Telegraphers' organization concurs with your position?

Mr. Dwyer: I object.

Mr. Davis: All right. You produce a letter of July 9, 1940.

Mr. Dwyer: You did not ask me to produce it, sir.

Mr. Davis (Reading from notice to produce): "All other documents bearing upon the conduct of this case."

[fol. 90] Mr. Dwyer: I have had no contract with President Gardner. He is out in St. Louis.

Mr. Evans: Have you a letter of July 9, 1940, from Mr. Gardner to Mr. Chadwick?

Mr. Dwyer: I do not have any such letter, and I do not know of any such letter.

Mr. Davis: Read the question.

Q. (Read by Reporter:) Do you know whether President Gardner of the Telegraphers' organization concurs with your position?

Mr. Dwyer: Same objection.

The Court: Sustained.

Q. Is there anything in the agreement Exhibit 10 that a person listed therein cannot give information by telephone?

Mr. Dwyer: I object to that. It is a matter of interpretation of the contract.

The Court: Sustained.

Q. Is there a Scope Rule in Exhibit 10, Mr. Moffatt?

A. There is.

Q. Is there any rule in Exhibit 10 which states what work must or must not be performed by Telegraphers?

A. There is no rule at all.

Mr. Dwyer: I object to that and ask to have it stricken out, as a matter of reading or interpreting the contract which is in evidence.

The Court: Overruled; motion denied.

Mr. Dwyer: Exception.

Q. During the negotiation of Exhibit 10 was the Elmira Yard case brought up?

A. Not to my knowledge. Just a minute. They did bring that up, and Mr. Chadwick wrote me about it on April 24, 1940.

[fol. 91] Q. What did you tell him at that time?

A. I told him the present arrangement would continue until the Thurston Avenue crossing was eliminated, as we previously agreed to, and that we would not add the position to the agreement.

Mr. Dwyer: Was that in the letter or was that conversation?

The Witness: That was conversation.

Q. Since May 1, 1940, when Exhibit 10 became effective, have the Telegraphers ever presented any claims under the old agreement of 1929, which is Exhibit 1?

A. Not to my knowledge. I believe every claim presented subsequent to 1940 was based on the May 1, 1940, agreement.

Mr. Evans: Do you mean every agreement subsequent to May 1, 1940?

The Witness: Yes.

Q. When subsequent to May 1, 1940, was there any further protest made by the Telegraphers with respect to the work which they claimed the Crew Callers were performing which belonged to them?

A. On June 4, 1942, General Chairman Chadwick wrote to Superintendent Lerbs about it.

Q. Do you recall generally what was the nature of that protest of June 4, 1942?

Mr. Dwyer: I think I requested that letter.

Mr. Davis: That is right; you did.

Mr. Dwyer: Do you have the letter?

Mr. Davis: Yes.

Mr. Davis: Read the question.

[fol. 92] Q. (Read by Reporter:) Do you recall generally what was the nature of that protest of June 4, 1942?

Mr. Dwyer: Let's have the letter in evidence.

Q. Can you answer the question?

A. Yes.

Mr. Dwyer: I object to it. There is a written instrument.

The Court: Objection sustained.

Q. Is this the letter which was written (indicating)?

A. Yes.

Mr. Davis: I offer it in evidence.

Mr. Dwyer: No objection.

The Court: Received.

(Letter from Mr. Chadwick to Mr. Lerbs, dated June 4, 1942, received and marked: Plaintiff's Exhibit No. 11.)

Q. What action was taken by Superintendent Lerbs?

A. He replied to the letter on June 10, 1942.

Q. Was the matter then handled with you, or subsequently handled with you?

A. Yes.

Mr. Dwyer: Do you want that letter you asked for? I have it here (producing a letter).

Mr. Davis: What letter was that?

Mr. Dwyer: The letter of June 10, 1942.

Mr. Evans: The reply of Lerbs.

Q. Before it was handed to you, do you know whether Mr. Lerbs made a reply to Mr. Chadwick?

A. Mr. Lerbs talked to me about it, then wrote a letter to Mr. Chadwick under date of June 10, 1942.

[fol. 93] Mr. Davis: I offer that letter in evidence.

Mr. Dwyer: No objection.

The Court: Received.

(Letter of June 10, 1942, Mr. Lerbs to Mr. Chadwick, received and marked: Plaintiff's Exhibit No. 12.)

Q. To your knowledge were the instructions mentioned in Exhibit 12 issued?

A. They were.

Q. Do you know when?

A. No. I assume the Superintendent issued them immediately when he wrote the letter.

Mr. Dwyer: I object to any assumption.

The Court: Sustained.

Q. Do you know that they were issued, of your own knowledge?

A. Only that I was advised they had been issued by the Superintendent.

Mr. Dwyer: That still does not establish the fact that they were issued.

Q. I believe, Mr. Moffatt, you testified this matter was subsequently handled with you by General Chairman Chadwick?

A. I think the next thing that happened was that Mr. Chadwick took it up with the Vice-president, Mr. Ray, in June, 1942.

Mr. Davis: Have you got that letter of June 30, 1942?

Mr. Dwyer: I think so (produces letter).

(Letter of June 30, 1942, Mr. Moffatt to Mr. Chadwick, marked: Plaintiff's Exhibit No. 13 for Identification.)

Q. I show you Plaintiff's Exhibit 13 for Identification, and ask you what that is?

[fol. 94] A. A letter addressed by me to Mr. Chadwick, under date of June 30, 1942, in answer to a letter addressed by him to Vice-president Ray.

Mr. Davis: I offer Exhibit 13 for Identification in evidence.

Mr. Dwyer: No objection.

The Court: Received.

(Letter received and marked: Plaintiff's Exhibit No. 13.)

Mr. Dwyer: Do you have the letter to Ray, the one I called for?

Mr. Davis: Yes (produces letter).

Mr. Dwyer: I ask to have that marked for identification.

(Letter dated June 23, 1942, Mr. Chadwick to Mr. Ray, marked: Defendant's Exhibit A for Identification.)

Mr. Dwyer: As we go along, Mr. Davis, and you are using the letters, if you have one which I asked for originally, will you have the original marked as my exhibit?

Mr. Davis: Yes.

By Mr. Davis (Continuing):

Q. What happened next, Mr. Moffatt, in connection with this Elmira case or in connection with the 'Telegraphers' organization?

A. Shortly thereafter the 'Telegraphers' Charter was suspended.

Mr. Dwyer: That was when?

The Witness: After June 30, 1942.

A. (Continuing:) And Mr. J. E. Elliott, Vice-president of the O. R. T. came on the property to manage the affairs of the organization, and on October 9th he wrote me a letter [fol. 95] about the Towermen at Elmira.

Q. The Charter you referred to was not suspended by the Railroad but by the parent organization, is that right?

A. My recollection is it was suspended by the President of the O. R. T.—advice furnished by him to the President of the Lackawanna Railroad.

Mr. Dwyer: You do not have personal knowledge of this, do you?

The Witness: Yes, absolutely, because I was there, I saw the letter.

Mr. Dwyer: All right; I just don't want you to go too far afield.

The Witness: Thank you.

Mr. Dwyer: You are welcome.

(Letter, Mr. Elliott to Mr. Moffatt, dated October 9, 1942, marked: Plaintiff's Exhibit No. 14 for Identification.)

Q. I show you Plaintiff's Exhibit No. 14 for Identification, and ask you what that is, Mr. Moffatt?

A. It is a letter addressed to me under date of October 9, 1942, by Mr. Elliott in which he says—

Mr. Dwyer: I object to his reading it.

Mr. Davis: I will offer Exhibit 14 in evidence.

Mr. Dwyer: No objection, only may I ask: Do you have the circular referred to in that letter?

Mr. Davis: I haven't got that. That is an entirely different case.

The Court: Received.

[fol. 96] (Letter received and marked: Plaintiff's Exhibit No. 14.)

Q. Shortly after this time did Mr. Elliott take the matter up with Mr. Shoemaker, who became General Superintendent?

A. He took it up with Mr. Shoemaker in a letter dated January 19, 1943.

Q. Has the Thurston Street crossing been eliminated, Mr. Moffatt?

A. No, it has not.

Mr. Dwyer: May I ask: Do you have that letter to which you referred?

Mr. Davis: Yes (produces letter).

Mr. Dwyer: I ask to have that marked

(Letter dated January 19, 1943, Mr. Elliott to Mr. Shoemaker, General Superintendent, D. L. & W. R. R. Co., marked: Defendant's Exhibit B for Identification.)

Q. Do you know the status of the Thurston Street elimination project?

A. There has been an order issued for the elimination, but it is my understanding it is a post-war project.

Q. In your opinion, Mr. Moffatt, if the Railroad Company concurred with the contention of the Telegraphers and restored the Operators at the Yard office, and discontinued the positions of Crew Callers, would there in your opinion be a claim from the Clerks' organization?

Mr. Dwyer: I object. If the Court please, it is a matter of law whether there would be or would not be.

Mr. McEwen: I think I will join in the objection. The witness is not in position to state what our organization would do.

[fol. 97] Mr. Dwyer: The Railroad Labor Act and the contract determines the rights of the parties.

Q. Did you have any conversation in connection with this with any representative of the Clerks' organization?

A. Yes, I did.

Q. With whom were those conversations had?

A. The General Chairman.

Q. What was the nature of those?

Mr. Dwyer: Who was the General Chairman?

The Witness: Louis A. Carlo.

Q. What was the nature of these conversations, Mr. Moffatt?

Mr. Dwyer: I object unless the times and places are fixed.

The Court: Sustained.

Q. When were the conversations held?

A. This last year, as near as I can give it to you.

Mr. Dwyer: I object to the general statement about conversations occurring within the last year. That is not definite enough.

The Court: Overruled.

Mr. Dwyer: Exception.

Mr. Dwyer: Can you state the place or persons present at the conversations?

Q. Go ahead.

A. Mr. Carlo and I discussed the matter, I think on two different occasions.

Mr. Dwyer: Where, if I may ask?

Q. Where?

A. Either in my office or at Hoboken, New Jersey. But I am unable to say whether any other individual was there at the time. It was more or less of a general discussion, [fol. 98] and Mr. Carlo indicated to me that the interests of the Brotherhood of Railroad Clerks was to protect the rights of the men whom they represented on the Lackawanna Railroad.

Q. This Elmira situation was involved in that discussion?

Mr. Dwyer: He has not said so.

Q. Was it?

A. That was the subject of the conversation.

Q. What, Mr. Moffatt, was the nature of the claim presented to you by the Telegraphers' organization?

Mr. Dwyer: I object to that, and all this testimony concerning that claim. What are we going to have, a summation now? It is already in evidence. There is nothing for him to testify about.

The Court: We will take a recess to 2:00 o'clock.

(Recess, 12:15 P. M. to 2:00 P. M. today.)

[fol. 99] August 6, 1945.

Supreme Court Chambers, Elmira, N. Y.

Afternoon Session commencing at 2:00 o'clock.

Trial continued.

EARL B. MOFFATT, a witness for the Plaintiff, recalled to the witness stand, testified as follows:

Direct examination (Continued):

By Mr. Davis:

Mr. Davis: I would like to offer in evidence a letter dated August 1, 1939, from Mr. West, Local Chairman, to W. G. Alexander, Superintendent.

Mr. Dwyer: No objection.

The Court: Received.

(Letter, dated August 1, 1939, Mr. West to Mr. Alexander, received and marked: Plaintiff's Exhibit No. 15.)

By Mr. Davis:

Q. Mr. Moffatt, I notice in Exhibit 3 that Crew Callers are excepted from that agreement. It says: "Train and engine crew Callers are excepted." Does that exception include the Crew Callers we are talking about at the Elmira Yard office?

A. No. These fellows at the Elmira Yard office are Crew Clerks. The fellows commonly called "Crew Callers" are what in the old days were called "Call Boys." They are fellows that go out to these fellows' houses and wake them up at night to get on their job, and so forth. The purpose [fol. 100] of that exception at the time the agreement was made was because these fellows were not performing clerical duties or a majority of clerical duties.

Q. Then in your testimony this morning, when you said "Crew Callers," you were referring to employees at the Elmira Yard office who have been called both Crew Callers and Crew Clerks?

A. That is right, but they are Crew Clerks.

Mr. Davis: That is all. You may examine.

Cross examination.

By Mr. Dwyer:

Q. Now in negotiating these contracts, Mr. Moffatt, you negotiate with the General Chairman and his General Committee, do you?

A. We did with the Telegraphers.

Q. And having arrived at an understanding as to what the contract terms are, you reduce it to writing, and print copies such as we see here, is that correct?

A. That is correct.

Q. This conversation you had with Mr. Voss, in which you say he waived the right to insist upon the work now in dispute being handled by members of his organization, has not been reduced to writing, has it?

A. I do not think I quite made that statement. My statement was that we had arranged for certain reductions in

the payroll, and Mr. Voss said he would not object to those reductions being made, providing we increased the rate of the men in the tower from 71 cents to 74 cents per hour.

Q. That then is the substance of the agreement you arrived at with Mr. Voss, is that right?

A. That is correct.

[fol. 101] Q. And as a result of that agreement this letter of April 30, 1938, Plaintiff's Exhibit 4 in evidence, was written by you to Mr. Alexander, is that correct?

A. That is correct.

Q. How long prior to that had you and Mr. Voss had your discussion of this matter?

A. I do not recall; probably two or three days.

Q. Now you didn't write a letter to anybody connected with the Order of Railroad Telegraphers concerning this at that time, did you?

A. I see no reason why I should have.

Q. Well, you didn't do it?

A. I did not.

Q. Isn't there just as much reason to have done that as there is in the first case, reducing the contract to writing?

A. Not at all.

Q. Why?

A. There is nothing in the contract that forbids reduction of employees covered by the contract, if there is not enough work for them to do.

Mr. Davis: I object to this because Exhibit 4 shows on its face a copy of the letter was sent to Mr. Voss, and he testified to that this morning.

Q. Then, as I take it, the only thing you accomplished with Mr. Voss in your conversation with him was that you effected a reduction in personnel because of the fact there was not sufficient business to employ the people then employed in the Elmira Yards?

A. That is correct. In the same manner that if we needed more men if there was more work, we would put more men on, and we would not confer with Mr. Voss about that either.

[fol. 102] Q. Then let me call your attention to the fact that Exhibit 4 refers only to an increase of from 71 to 74 cents per hour for the Towermen affected, is that correct?

A. That is what the letter said, but I think I testified this morning to the effect Mr. Voss concurred in the agreement providing we made the increase.

Q. That is the only writing concerning the arrangement, isn't it?

A. There is volumes of writing about it, but that is the only particular thing that transpired about it at that time.

Q. You did not write any volume at that time?

A. No, that has occurred since.

Q. You do not claim, as I now understand it, that Mr. Voss or any other person or group of people at that time, in April 1938, waived their right to have the work, which properly fell within the scope of the Telegraphers' agreement with you, performed by Telegraphers?

A. There never was any question arose as to that, because the arrangement that was made had no reference whatsoever as to what the contract provided as to what was or was not Telegraphers' work. In the contract there isn't anything at all that delegates any particular duties of any kind to Telegraphers.

Q. Let me ask you this about delegation of duty. Let us take a hypothetical proposition. If you had in the Elmira Yard office a man whose principal work was communications, which historically belonged to the Telegraphers, and you laid that man off and substituted in his place a man whom you called a Crew Clerk, and assigned [fol. 103] to him precisely the same function that the Telegrapher had performed, would you then say that because of the fact you called the man a Crew Clerk rather than a Telegraph Operator, or some other designation within the Telegraphers' contract, that that eliminated that job from the scope of the Telegraphers' agreement?

Mr. Davis: I object to that as incompetent, irrelevant, and immaterial, assuming facts which are not in issue in this lawsuit. And there is no proof in this lawsuit as to what historically was Telegraphers' work.

Mr. Dwyer: Might I say on that, if the Court please Mr. Davis this morning held this witness out as an expert in railroad affairs. I do not agree that he is an expert in contract law, but I am willing to take him as an expert in railroading, and I believe that as such I am entitled to propound to him a hypothetical question such as I have just propounded.

Mr. Davis: It seems to me we ought to know what the actual facts are as to what historically was Telegraphers' work before the witness is able to answer the question.

Q. I will withdraw the question, Mr. Moffatt. Communications work, historically, is the function of the Telegrapher in railroading, is it not?

A. No, absolutely not.

Q. What is?

A. Communications is performed by many people who are not Telegraphers.

[fol. 104] Q. I am talking about away back in the beginning,—the Telegrapher was the communicating agent in the railroad set up, wasn't he?

A. Because in those days practically the only means of communication was the telegraph instrument. That later was improved upon by many other ways of communication.

Q. And as improvements came along and the telegraph was supplanted by the telephone, those persons who were classified in the railroad as Telegraphers continued to do the communications work?

Mr. Davis: I think we ought to know what Mr. Dwyer means when he says "communication work." There are all types of communication: some for the movement of trains, some involving the weather report, and some involving general information. If he describes the type of communication, maybe Mr. Moffatt will be in position to answer.

Mr. Dwyer: He knows more about it than I do. He is an expert. I can't describe it to him to make him answer it if he doesn't know already.

Q. Let us go at it this way, Mr. Moffatt. What type of communications were handled by the Operators in the Elmira Yard office prior to May 1, 1938?

A. Communication with the Train Inspector, the acceptance of train orders, the preparation of clearance cards under orders from the Dispatcher, and certain other miscellaneous work as required.

[fol. 105] Q. That was all communication between divisions or employees of the road which facilitated and entered into the operation of the trains, is that correct?

A. Why, certainly.

Q. And the functioning of the railroad substantially is the same today as it was in 1938, isn't it? You have train orders, clearance cards, rail reports, O-S reports, and all the rest of it?

A. That is right.

Q. The same type of orders, reports, and everything else?

A. That is right.

Q. And the same records of train operations are kept today as were kept in 1938, are they not? They are kept by the Towermen at Elmira and the work is done by them.

Q. All of them?

A. Yes; all the train movements, and records, and everything else is done by the Towermen at Elmira.

Q. Do you want to tell us now that all the communications functions handled by the Operators in the Elmira Yard prior to May 1, 1938, are now handled by the Tower Operators at Lehigh Valley tower?

A. No; I never made that statement.

Q. I thought that is what you told us. How much of it is handled by the Tower Operators?

A. Everything that pertains directly to train movements.

Q. Tell us what that is?

A. It refers to train orders, clearance cards, O-S reports, and different things.

Q. Are all the O-S reports handled at the tower?

A. Yes.

[fol. 106] Q. Rail reports?

A. Yes.

Q. And the whole list of miscellaneous reports concerning train operations?

A. It all depends what you mean by "miscellaneous."

Q. What about consists?

A. They are handled by the Crew Clerks. Elmira is not the only place on the railroad where consists are handled by the Train Clerks.

Q. They do it at East Buffalo too?

A. Yes. And they have done it at other places for the past 20 years I know of.

Q. Substantially, that is handled by the Telegraphers, isn't it?

A. No. You do not get the idea. Telegraphers do certain duties having directly to do with the movement of the

trains. They are assigned additional work to perform, the same as a Clerk may have assigned to him Telegrapher's duties at various places. It is simply a case of where a man is assigned to do eight hours per day.

Q. And if there isn't the work there for him, you lay him off?

A. Of course we would, sir.

Q. And if you need more men you hire them?

A. Yes, sir.

Q. Now let us take a hypothetical case while we are at it. Let us assume the traffic in the Elmira Yards increases tremendously, so that the present force handling train orders and those things directly affecting the movement of trains, as you say, which belongs to the Telegraphers, were unable to handle the work and it was necessary to put other employees on a similar job, now there is no question, is there, [fol. 107] Mr. Moffatt, but what under your contract with the Telegraphers you would have to employ members of the Order of Railroad Telegraphers to handle that work, wouldn't you?

A. I can't answer your question yes or no.

Q. Why not?

A. If you mean by the question, that the work now being performed by the Towermen at Elmira grew to such proportions that additional work of that kind were necessary, we probably would employ a Helper in the tower or an Operator in the Yard office,—that question would be answered yes.

Q. And if you needed another man down in the passenger station,—what is a Clerk Operator?

A. A Clerk Operator?

Q. If you needed another man down in the passenger station to do the same thing the Clerk Operator is doing, there is no question but what he would have to be a person who would qualify under the Telegraphers' agreement?

A. There is a very serious question.

Q. There is?

A. Yes, sir.

Q. Why?

A. Because the work in the Elmira ticket office is work of a double character. It is both clerical work and selling tickets, and so forth, and also Western Union work, and train Dispatcher work, and so forth. If the work increased to a

very perceptible degree, it is a big question in my mind whether we wouldn't put on a straight Ticket Clerk.

Q. I understand that, but I am assuming you put a man on who was going to do eight hours a day, the same as the [fol. 108] Clerk Operator does, then there would be no question about it, would there?

A. If we put a man on and called him Clerk Operator, no.

Q. If you called him a Janitor and he was doing exactly the same thing as a Clerk Operator, then there would be no question, would there?

A. He would not be called a Janitor.

Q. You are assuming you are going to change the name of the man.

A. I think you are the one that is assuming.

Q. I am assuming we are going to get along with this law suit. I assumed in the first instance the man was going to do identically the same thing as the Clerk Operator.

A. Put it this way—

Q. That is not difficult, is it?

A. Let me answer the question in my way and perhaps it will give the answer you want.

Q. Go ahead.

A. Going back to the time when Clerk Operators worked 12 hours, two men covered a 24 hour shift. Then an 8 hour day came along and it required another man to cover 24 hours,—and another man put in under those circumstances; the answer to your question is yes.

Q. Under any other circumstances, unless you made another job that definitely had nothing to do with communications, —which is the basis of the Telegraphers' work, is it not?

A. That is the functional basis of it, yes.

Q. Unless a job was created which had nothing whatever to do with communications, and paralleled the functioning of the present employee, there still would be no question about it, would there?

A. Oh, yes, there would, a very serious question.

[fol. 109] Q. If he performed the same operations?

A. It is not a question of performing the same operations.

Q. That is my question to you. I am asking you a hypothetical question. It is not difficult, is it?

A. Yes, it is difficult.

Q. All right. Let us get out of the Elmira Yard and go some place. Where else do you use Telegraphers?

A. Wherever it is shown in the book there.

Q. I will look somewhere else, and if I get to an Agent Operator I suppose you are going to make him a full time Agent, are you not?

A. No.

Q. All Telegraphers, practically speaking, do some other thing incidental to their job other than straight communications work, don't they?

A. That is right, certainly. They do 8 hours work, but there is nothing in the rule book that gives them a priority right to that work.

Q. You made a contract with them, Mr. Moffat, in which you say it will apply to Telegraphers, Telephone Operators except Switchboard Operators, Agents, as shown in the Rate Schedule?

A. As shown in the Rate Schedule.

Q. "Agents?"

A. Yes, sir.

Q. I am not arguing with you.

A. Of course not.

Q. "Assistant Agents, Agent Telegraphers, Towermen, Levermen, Tower and Train Directors, Wire Chiefs, Managers of Telegraph Offices, and Operators of Mechanical Telegraph Machines installed for the purpose of replacing [fol. 110] telegraphic communications, hereinbefore referred to as employees? That is the provisions of your contract, isn't it?"

A. That is right.

Q. And as to those people, they do have a prior right to fill the jobs, don't they?

A. They have a right to fill every job shown in this book so long as it exists.

Q. And if you give a man who is a Crew Clerk or a Crew Caller a job previously held by a Telegrapher, and have him perform the same functions of the Telegrapher, with the exception of train orders and clearance cards, in addition to functions of a Crew Clerk or Crew Caller, in your opinion then, as an expert, that wipes the Telegraphers out of the picture, doesn't it?

A. No.

Q. And that is your position in this particular instance, isn't it?

A. No, sir; it is not.

Q. That is what you have done in this instance?

A. No, I have not done any such thing, sir. We have transferred all work that has to do with train movement, to which in our judgment the Telegraphers are rightfully entitled to, to men employed under the Telegraphers' Schedule. The other work has been assigned to other employees who have time under the 8 hour period to perform it.

Q. And you say this Exhibit 4 is a confirmation of that?

A. Absolutely.

Q. Of course when you got around to negotiate the 1940 agreement you did not eliminate any of these people referred to in the Scope Rule from the scope of the contract, did you? [fol. 111] A. No, sir. But we did eliminate the jobs that were previously shown in the prior agreement as formerly existing in the Elmira Yards.

Q. You are doing very well. You anticipated my question. And it is now your contention that when you and the Telegraphers bargained and effected that 1940 agreement, that you bargained only for those people filling the jobs enumerated in the Rate Schedule attached to or made a part of the schedule?

A. That is absolutely right, with the exception that if any additional jobs of like character were added, they would also be asked to go in.

Q. At the time you made that agreement you knew, did you not, that the Clerks took the position that the Crew Callers or Crew Clerks, as they may be, in the Elmira Yard office were performing regularly day in and day out duties which properly belonged to members of the Telegraphers' organization and which they had demanded be returned to members of the Telegraphers' organization?

A. I did not know it. I never had a complaint from the Clerks about it.

Q. I am talking about the Telegraphers.

A. You said Clerks.

Q. At the time you effected the 1940 agreement you knew the Telegraphers claimed, and had consistently claimed, that the Clerk were performing functions which properly should have been performed by members of the Telegraphers' organization?

A. I knew no such thing, sir, because at the time of the [fol. 112] conference with these men the Elmira case came up, as was shown by exhibits this morning, and I had a letter from Mr. Chadwick himself thanking me for the court-
esies extended and saying everything was hunky-dory.

Q. You had written this Exhibit 4, which stated that the Towermen were to be increased from 71 cents to 74 cents, and you had discussed the change with General Chairman Voss and he had concurred in that arrangement?

A. That is right.

Q. Then on August 1, 1939, Mr. Alexander received a letter, Exhibit 15, from Mr. West which complained specifically about what the Crew Clerks were doing which belonged to the Telegraphers, is that correct?

A. Mr. West wrote such a letter to Mr. Alexander.

Q. And it had been brought to your attention?

A. It was brought to my attention subsequently to the receipt of that letter by Mr. Alexander, and I think this morning the answer of that letter was shown as another exhibit.

Q. Here it is, Exhibit 7, in which Mr. Alexander,--I presume acting under instructions from you, or after consultation with you?

A. Yes, sir.

Q. Wrote and said "The privilege of closing towers or telegraph offices to meet changing conditions has been recognized for years and is not prohibited by any agreement or practice." And he further said, up in the letter, "Furthermore, the work properly coming within the scope of the Telegraphers' agreement is being done by Telegraphers"?

A. Correct.

[fol. 113] Q. Then on December 2, 1939, you wrote Mr. Chadwick, which is Exhibit 8, and said concerning Elmira: "Present arrangement to be continued until such time as grade crossing project is completed, when present Tower Operators will be transferred to the Yard office"?

A. That is right.

Q. So that that had occurred prior to the time that you negotiated the 1940 agreement, and you had knowledge of that at that time, had you not?

A. No, I think you are a little bit mistaken, sir.

Q. How am I mistaken?

A. Because when I wrote that letter in December, that simply confirmed an understanding and agreement we had

had, so that matter was water over the dam and was a closed matter when we started to negotiate on the 1940 agreement.

Q. When you negotiated the 1940 agreement did you ask anybody what their intentions were concerning the time in the future when the Elmira L. V. tower would be abolished?

A. ~~Not~~ to my knowledge, I did not.

Q. Was that discussed?

A. I have no recollection of it. It may or may not have been. I won't say yes or no, but I do know this, and I think I testified to it this morning, that when the negotiations for the agreement were concluded, every job that the Telegraphers represented was included in that agreement, and they had an opportunity to check them before it was printed.

Q. Every job which the Telegraphers then represented was in the agreement?

A. That is right.

[fol. 114] Q. But that does not mean that every operation to which the Telegraphers are entitled was in the agreement, does it?

A. Why, put it this way: you have got a great many jobs on the railroad to do where Telegraphers are performing clerical work and where Clerks are performing what you term to be Telegraphers' work.

Q. Is there anything wrong with what I term to be Telegraphers' work? Am I mistaken about what is Telegraphers' work?

A. I don't know. I do not think we have the same understanding about it.

Q. Doesn't it all boil right down to this, that the thing involved in this lawsuit is a determination of what functions on your railroad belong to Telegraphers and what functions on your railroad belong to Clerks?

A. No, I do not think it is to determine any such thing. I think it is to determine just what right the Telegraphers have to ask for work, and so forth, that is outside of the scope of their agreement.

Q. Let us approach the 1940 contract in this manner. After this change had been made in Elmira the Railroad, either through you or some other officer, discussed doing the same thing in Binghamton, did you not?

A. I do not recall.

Q. You had no knowledge that that was contemplated in Binghamton?

A. I have no recollection of it.

Q. Did you have any recollection of it at the time you negotiated the 1940 agreement?

A. I do not recall it.

[fol. 115] Q. But when you did negotiate the 1940 agreement, you knew the same question obtained in the East Buffalo Yards, didn't you?

A. What question?

Q. The same as you had here in Elmira?

A. No; we had no question in East Buffalo.

Q. None at all?

A. Not to my knowledge.

Q. I draw your attention to Exhibit 8, Number 6: "East Buffalo Yard operators. This request to be withdrawn." Didn't you have a similar question there?

A. It may or may not have been. I do not recall just what it was. If it was, it was withdrawn by agreement.

Q. But at any rate, whatever arrangement you had with Mr. Voss contemplated that Telegraphers, Telegraph Operators, or Towermen Operators, would perform all of the functions which properly belonged to members of the O. R. T.?

Mr. Davis: I object to that unless he defines the functions he is talking about.

The Court: Overruled.

Mr. Davis: Exception.

Q. Isn't that correct?

A. No, it is not correct.

Q. Isn't that what you told us about?

A. No, sir.

Q. Tell us again what it was?

A. I think I said that the negotiations had to do with jobs as outlined in that agreement.

Q. Which agreement?

A. Right there, 1940 (indicating).

[fol. 116] Q. I am going back to 1938. Perhaps you did not understand that. I am talking about your negotiations or conversations with Mr. Voss resulting in your letter of April 20, Exhibit 4?

A. There was absolutely no claim made by Mr. Voss that there was work belonging to Telegraphers that was being taken away from them.

Q. You did not tell him work belonging to Telegraphers was to be taken away from them?

A. I would not tell him that because it wasn't true.

Q. And you did not understand that was to happen, did you?

A. What?

Q. That work belonging to Telegraphers would be taken away from Telegraphers by this proposed change?

A. That has not been done.

Q. And you say today Telegraphers are doing everything they are entitled to and every function they are entitled to do in Elmira in the operation of this agreement?

A. In my judgment, yes and being done through agreement with them.

Q. So that if, as and when you are convinced, or it is determined some place, that the functions being performed in the Yard office, or a substantial portion of them, are functions which properly should be performed by members of the O. R. T., you would have no hesitancy about restoring those functions to the members of the O. R. T.?

A. I would have no hesitancy in restoring work as might be required to any Operator that we might put on at Elmira to perform work in the Yard office, and if and when Thurston Street is eliminated, and the operators should move from the tower to the Yard office, they will be assigned to such duties as will give them 8 hours work per day.

[fol. 117] Q. Now let us be a little specific about communications. There is no question about the train orders and clearance cards there in the tower, is that correct?

A. There never was with me.

Q. Drill reports,—who handles them?

A. Drill reports?

Q. Yes.

A. They are usually turned in by the Yard Foreman.

Q. And what is done with them?

A. Simply turned into the Yard office.

Q. What becomes of them after they are turned into the Yard office?

A. They go to the Superintendent or General Yardmaster for check.

Q. In Buffalo?

A. They may be mailed to Buffalo; I don't know.

Q. Aren't they telephoned in?

A. Some information from them may be telephoned in.

Q. Where are they handled?

A. The handling would be in the Yard office.

Q. By whom?

A. It might be by any one of three or four men, so I could not tell you.

Q. What is their designation?

A. They are all in clerical capacity.

Q. "Train delay en route,"—who handles that in Elmira?

A. For the most part I think that is telephoned by the Crew Clerks.

Q. Where?

A. To the Train Dispatcher.

Q. In Buffalo?

A. I think so.

Q. They are recorded at both ends?

A. No.

Q. What?

A. No, only in Buffalo.

Q. You say "Only in Buffalo"?

A. That is all I know.

[fol. 118] Q. Doesn't the fellow down here make a record of the fact he called the report in?

A. He might put it down that he telephoned at a certain time.

Q. Doesn't he have to put it down?

A. He may put it down.

Q. Your railroad doesn't run by chance? You have a well ordered routine?

A. Sure.

Q. It is not a question of he may put it down,—he does put it down, doesn't he?

A. When the Conductor gets in, if he doesn't leave a delay report, and he is asked for it, he does it, and the men will telegraph it to the Train Dispatcher.

Q. That is handled by the Clerk?

A. Yes, but it isn't anything that could be handled by a Towerman.

Q. It could be handled by somebody in Mr. Adams' office if they got it up there, couldn't it?

A. Certainly.

Q. And the 0-2,—that is a report of the train as it goes through a particular point, isn't it?

A. Yes.

Q. Who handles that in Elmira?

A. The Towerman and the Operator at the East End Station.

Q. They are the only people?

A. Yes.

Q. That is a matter of record that concerns the movement of trains, doesn't it?

A. Sure.

Q. Are you sure it is not handled in the Yard office by the Clerk?

A. No, I think what you are referring to is the time of calling a release.

Q. I will just go down through these reports and find out what happens. What is a "Consist"?

A. A Consist is a telephoned report of the number of [fol. 119] cars, the kind of cars, the type of freight, and the tonnage, engine number, and various items of information which relate to a train moving over the railroad.

Q. And what cars go on and off at various points?

A. No.

Q. Doesn't it give you the destination of a car?

A. It gives you the destination, sure.

Q. That is where a car goes off, at its destination?

A. For the most part, you understand that on a Train Consist that comes in here, there are cars going beyond Elmira?

Q. Yes, but now and then a carload of freight drops off here?

A. Yes, now and then. The purpose is for giving the Yardmaster information as to how many cars he can put on the train, what tonnage he can add, and so forth.

Q. That is handled by whom now?

A. By the Crew Clerks.

Q. That is reduced to record, isn't it, at both ends of the line?

A. It isn't any different than we have at other places on the railroad.

Q. It runs the same all the way along?

A. Yes.

Q. It is a matter of record on both ends of the line?

A. Everything that is done on the railroad is a matter of record, practically. It is a matter of record and it is done by hundreds and hundreds of people.

Q. And that is true of the "Drill Report"; it is not a question of maybe he writes it down or maybe he doesn't; he does make a record of it every day?

A. All right, if he does.

[fol. 120] Q. And "Delayed Train Reports,"—there is no question about it?

A. No.

Q. What about train "Reaches," messages that state what time a train will reach a designated spot, so the Crew Caller can call out his crew?

A. That is right.

Q. Who gets that information?

A. The Crew Caller gets the information.

Q. From the Dispatcher in Buffalo?

A. Yes.

Q. And makes a record of it?

A. Sure he makes a record, so he will be safe on calling his crew.

Q. "Train delays": they are reports of operating delays, are they not?

A. Yes.

Q. Who gets them here?

A. I think the Conductor leaves them at the Yard office.

Q. Then what happens?

A. If the Dispatcher wants them, he can get them from the Crew Clerk or anybody else.

Q. They are recorded on either end of the wire?

A. The Train Dispatcher puts it on his sheet, I suppose.

Q. And the Crew Clerk makes a record of it?

A. No, he has it in writing.

Q. And the Train Dispatchers,—their messages affect operations along the route?

A. Yes.

Q. Changes in the routing of a car and things of that kind?

A. Yes.

Q. Who handles that in Elmira?

A. That might be handled by six or seven men in the office. There are hundreds of those cases handled in the Clerks' offices every day at Scranton by telephone.

Q. They are recorded at either end of the wire?

A. Yes,—usually confirmed by a mailogram.

[fol. 121] Q. And there are a host of miscellaneous messages, aren't there?

A. I would not say "host."

Q. I will strike out the word "host" and say there are "miscellaneous" messages?

A. There may or may not be. I wouldn't say what they are.

Q. At any rate, prior to May, 1938, all that work was handled by the Operators in the Elmira Yard, wasn't it?

A. Some of the work you speak of was. I don't know whether all the work was or not.

Q. You know that none of these things are handled by the Operators in the tower, are they, now?

A. At the present time, I think not.

Q. How much of it is handled by the Operators in the ticket office?

A. Most of the work pertaining to the movement of trains on the east end.

Q. They do not handle any of this stuff I have just enumerated, do they?

A. Your Consists and so forth?

Q. Yes, all this stuff?

A. No.

Q. So that when you abolished the three jobs in the Elmira Yard office, you transferred practically all of the work involved in those three jobs, with the exception mainly of train orders and clearance cards, to the Crew Clerks, in addition to the duties that the Crew Clerks then had, did you not?

A. No, we did not transfer any such amount of work at all. The whole work in an 8 hour period that the Crew Clerks are doing, and the multitude of work you are speaking of, wouldn't take an hour and a half a day.

[fol. 122] Q. I am not trying to make out they are over-worked. I think maybe they are getting along all right. I know they are.

Q. The point is this, that under an arrangement with Mr. Voss, which perhaps according to the correspondence was temporary in nature pending a grade crossing elimination, you eliminated three jobs and spread the work amongst people other than those in the Telegraphers' craft, and have been informed of the fact that that is disputed, that that

will not be tolerated on a long term basis, and entered into an agreement in 1940 which provided for substantially the same work as the prior agreement, and maintained with the organization ever since that time that everything which properly belonged to the Telegraphers would be given to the Telegraphers, did you not?

Mr. Davis: I object to that as improper, and incompetent, assuming facts which are not true, and stating some facts which are not true, and I think, if I understand it correctly, there are four or five questions all tied up in one. It seems to me it is a summation rather than a question.

The Court: Objection sustained.

Mr. Dwyer: Exception.

Q. By the way, don't you know Mr. Voss is now dead?

A. I didn't know it until Mr. West told me today. Mr. Voss was in my office as late as April or May of this year. I just heard of his death today noon.

Q. There will be no question about it. I just wanted to straighten it out.

[fol. 123] A. I understand that perfectly. I was sorry to hear about it. He came into my office I think the latter part of April or forepart of May.

Q. You didn't discuss these things with Mr. Carlo, or anybody representing the Clerks, as I understand it, until two occasions within the past year, is that right?

A. I believe that is correct. There never had been any question with the Clerks about performing the work that was assigned to them.

Q. And then your conversation with him, I take it, was rather casual and did not apply particularly to Elmira, did it?

A. Yes, I think it applied particularly to Elmira.

Q. Well, the substance of Mr. Carlo's remarks to you was that the interest of his organization was to represent the rights of their members in Elmira?

A. That is right.

Q. That is the interest of every organization, isn't it?

A. Sure.

Q. So that was of a moment in this matter, was it?

A. I think it was of quite some moment.

Q. He did not say: "We are going to insist on hanging on to those things," did he?

A. Well, I do not suppose he said it in words to that effect, but perhaps the inference was there?

Q. He didn't write you a letter and say: "I understand the Telegraphers are making claim to certain functions now being performed by Crew Clerks in Elmira, and we insist on keeping that work," did he?

A. He did not write me any such letter.

[fol. 124] Q. And the substance of the letter, in which he makes the claim set up in the complaint, was that it was the interest of his organization to protect the rights of the members in Elmira?

A. Yes. If there was anything about changing the rights of these members to do the work they were doing, we would probably have a complaint from them.

Q. That is your conclusion?

A. Yes.

Q. He did not say that himself?

A. He can answer that himself.

Q. Where did these conversations occur?

A. I think I testified they occurred either at New York or Hoboken; I am not sure which.

Q. Was Mr. Carlo alone when you were talking to him?

A. I do not remember.

Q. Were they just casual meetings?

A. Yes. I meet him very frequently.

Q. And then, of course, you are familiar with the fact, aren't you, that in 1943, in June, July and August, three letters went from Mr. Slocum, as General Chairman of the O. R. T., to Mr. Shoemaker, who was General Superintendent, concerning this dispute, which were unanswered? Did you know that?

A. I do not recall it.

Q. Did you know that then, on September 1st, Mr. Slocum wrote Mr. Ray about a failure to receive a reply from those letters?

A. He may have the record, which will speak for itself. I do not recall.

Q. You are familiar with the operation of the Railway Labor Act, are you?

A. The operation of the Act?

Q. Yes, how it works?

A. I am not too familiar with it perhaps.

[fol. 125] Q. Are you acquainted from time to time with the awards that are handed down by the various Divisions?

A. Yes, I see a great number of them.

Q. Were you familiar with Award No. 615, between the Brotherhood of Railway and Steamship Clerks, Etc., against the Southern Pacific Company, Pacific lines, which was——

Mr. Davis: I object to reading any awards in evidence.

Mr. Dwyer: I just wanted to tell about it.

Q. It was handed down on the 18th of April, 1938. Are you familiar with that?

A. It is pretty long ago for me to be familiar with it.

Mr. Davis: I object on the ground it is improper cross-examination.

The Court: Overruled.

Mr. Davis: Exception.

Q. Did you know about that one (passing papers)?

A. I may have seen it; I do not recall it.

Q. You do not recall it?

A. Not particularly.

Q. Do you recall this Award, No. 604, between the O. R. T. and the Atchison, Topeka & Santa Fe Railway, handed down the 30th of March, 1938?

A. No, I would not say now I was familiar with it. It is a long time ago. They come so fast they are pretty hard to keep track of.

Q. Don't you have them filed in your office some place and keep track of them?

A. No, I do not file them in my office; I send them back where they come from.

Q. Where do they come from?

A. They come to me from the Statistician.

[fol. 126] Q. At any rate, they do come to you and you look them over?

A. I glance at them, yes.

Q. Those two were handed to you about the time the change was effected here in Elmira?

A. Yes, evidently.

Q. I call your attention to Award No. 615, between the Brotherhood of Railway and Steamship Clerks——

A. That is the one you already mentioned.

Q. No. 1983, National Railroad Adjustment Board, Third Division, in 1942 in September. Do you recall that one?

A. Yes, but do not forget that most of these are handed down based upon perhaps—I do not know what the circumstances were in this particular case—but they are handed down perhaps in connection with certain rules or applications of rules which exist on a particular railroad, and have no reference whatever to what might be the case on some other railroad, and certainly had no reference to any arrangement which was made by agreement and confirmed by agreement.

Q. At any rate, you are generally familiar with these things as they come down, and you interpret them for yourself, do you?

A. I interpret them for my own satisfaction.

Q. And in your dealings with the various organizations with whom you have to negotiate, and what not, you try to recall what adjustments have been made in various situations, and govern yourself accordingly?

A. No; I have not been dealing with negotiations since January, 1943, but during the period I was, all my dealings [fol. 127] and negotiations were on what I thought was an attempt to be fair to both the men and the Railroad Company that I represent.

Q. Now, Mr. Moffatt, was there anybody in the Telegraphers' organization, aside from Mr. Voss, who agreed to that which you did in Elmira here in April, 1938, on anything other than a temporary basis?

A. Why, yes.

Q. Who?

A. Mr. Voss, when the arrangement was made with him in 1938, never raised a question of being on a temporary basis.

Q. I say, anybody other than Mr. Voss?

A. There was another agreement, and the records prove it, that there was an understanding and agreement with Mr. Voss's successor and his General Committee as to the continuance of the arrangement.

Q. That was pending a grade crossing elimination, was it not?

A. Yes, and it is still pending.

Q. And which at that time you thought was going to occur in a reasonable time?

A. I did not make any such representation. I did not then and do not know now.

Q. You did not tell anybody it was going to be 10 or 15 years, did you?

A. I don't know whether we knew.

Q. And you don't know whether it is going to occur within the next 15 years, do you?

A. No. It might occur within 15 months; I don't know.

Q. The fact the Public Service Commission has ordered it does not establish any date for its accomplishment, does it?

A. No.

Q. Because sometimes the Public Service Commission orders those things and they never occur?

[fol. 128] Mr. Davis: I do not think Mr. Moffatt is qualified to answer that question.

Q. In your experience in railroading wouldn't you say that is a fact?

A. No, I would not want to say that is a fact.

Q. At the time this change was effected, the Towermen at the L. V. tower in Elmira were members of the O. R. T., were they not?

A. I would not know that. I have no way of knowing who are members of the O. R. T.

Q. Let us put it this way: they were jobs contemplated under the Scope Rule of the agreement then in effect with the O. R. T.?

A. That is right.

Q. They did no message work at all, did they?

A. They did whatever work there was to do that was assigned to them during the period they were on duty.

Q. Don't you know they were Towermen and nothing else?

A. I do not know that at all.

Q. Didn't you on your direct examination testify that prior to May, 1938, they did miscellaneous message work? Was that your understanding?

A. No doubt they did.

Q. Don't you know that at the time the change was made, two of those Operators were bumped off because they could not operate, they could not handle the code, and they were replaced, although they enjoyed seniority at the time, or at least one of them did?

A. That is right. When the positions became Clerk Operators, it required the Morse code, but that does not

alter the fact communications could be handled in another method than by telegraph.

[fol. 129] Mr. Davis: You mean Operator Towermen, don't you, instead of Clerk Operators?

The Witness: Yes.

Q. Communications can be handled in a great variety of ways, can't they?

A. I think they can.

Q. And are?

A. That is right.

Q. Isn't it a fact that the Crew Clerk in the Yard office at Elmira keeps before him on his desk a Train Register, or whatever it might be called? Isn't that a fact?

A. Yes, sure.

Q. And that he is continuously making entries on that Train Register?

A. For his own information and guidance in handling crews.

Q. For whose information?

A. His own.

Q. Isn't that a permanent record?

A. Of course it is, yes.

Q. Then he does not keep it for his own information, does he?

A. He has it for his own information and for the information of any officer of the Railroad that needs it later, but he must keep that information.

Q. So that tomorrow you can tell what happens with respect to any particular train, or train order, or anything else, isn't that right?

Mr. Davis: The testimony is this man does not handle any train orders there, that they are all handled at the tower.

Q. The fact remains that is the process of record which was kept by the Operator in Elmira prior to May, 1938?

A. He may have kept a record of similar nature.

Q. Don't you know he kept that record?

A. He was there in the office and no doubt he had some kind of a record.

[fol. 130] Q. He kept that record, didn't he?

A. He kept a record. I don't know whether it was that record or not.

Q. He kept a train record, didn't he?

A. He kept a record.

Q. In 1938 didn't you keep the same train record you keep today?

A. I couldn't say that definitely because I do not know.

Q. There might be some slight change in form, but substantially it is the same?

A. I don't know.

Q. Aren't you an expert on railroad transportation?

A. No. You are the one that called me the expert.

Q. Your own Counsel called you an expert.

A. Then you both agree on it.

Q. I do not think you are an expert on some things. But you do get around these Yard offices, don't you?

A. Not any more.

Q. You better drop in and see the boys and see how they are doing.

A. I would rather have them drop in to see me, and a lot of them do it.

Mr. Dwyer: That is all.

Cross-examination.

By Mr. McEwen:

Q. Mr. Moffatt, there are a couple of matters I would like to get straightened out in my own mind. Is it your understanding that the Order of Railroad Telegraphers is claiming for its members certain work now performed by these Crew Clerks at the Elmira Yard office?

A. Absolutely.

Q. And is it your understanding that all of the work of these Crew Callers is also claimed by the Brotherhood of Railway Clerks?

A. Not exactly, but there has been no representation by [fol. 131] the Brotherhood of Railway Clerks to us to the effect that the work they are performing is not clerical work.

Q. What is your understanding of the position of the Brotherhood of Railway Clerks?

A. Just exactly what I stated in reference to what Mr. Carlo told me, that his interest is in the protection of the men at Elmira.

Q. Then you do not know whether the Clerks are claiming any or all of that work, is that right?

A. My understanding is this—I won't say this for a fact, but my understanding is that were that work to be taken away, that then we would hear from the Brotherhood of Railway Clerks.

Q. So that the dilemma in which you find yourself is that, as you understand the situation, there are two organizations claiming the same work?

A. That is right. In other words, there has been no claim from the Clerks because they are doing the work and no attempt has been made to give it to the Telegraphers, but were such an attempt made we would hear from them, and we would hear from them quick without a doubt.

Q. If it should develop that there were any items of this work to which the Brotherhood made no claims, would that change your attitude with regard to the situation?

A. Not at all, sir, because the arrangement was made, as I testified, under an agreement which we had every right to believe and understand would be fulfilled by the men with whom we made it, and furthermore such work, if there is anything in the story about certain work being Telegraphers' work, whatever there is to that, could be taken and could be performed by the Towerman, who is located very close to the Yard office, and the only difference is that instead of having this Clerk get certain information by telephone, he would probably be running over there and getting it from the Towerman, or giving it to the Towerman for transmission, and he would be a messenger boy instead of doing the business on the telephone. That is the whole story in a nut-shell.

Q. Just one more question. You served no notice upon either the Clerks or Telegraphers that you intended to negotiate or effect a change in any of the rules or working conditions under which they were operating under their respective contracts prior to the time you arrived at this agreement with Mr. Voss, did you?

Mr. Davis: I object to that. There is no such defense pled by the Telegraphers' organization in this case.

Mr. McEwen: He now comes in here and claims in effect a modification of the contract. Section six of the Railway Labor Act specifically states that a modification of a con-

tract, or re-negotiation of a contract, can only be had upon 30 days notice by one party to another.

Mr. Davis: I think it has been determined in this case, if your Honor please, that this is an action for the construction of a contract between the parties, and the Railway Labor Act is in no wise involved.

Mr. McEwen: No, no.

[fol. 133] Mr. Davis: Will you let me finish, please? That was the issue which was argued before Judge Personius, that is the issue which was argued before Judge Knight in Buffalo, and it has been specifically held this is an action for interpretation of the contract and is not in any way an action involving the Railway Labor Act.

The Court: Overruled.

Mr. Davis: Exception.

Q. Did you serve any such notice on either of these two organizations?

A. We were not changing the contract, and there was no necessity.

Q. I am not asking what you think you were doing. I am asking you the question: did you or did you not serve such a notice?

A. We served no notice of an intention to change the contract, because there wasn't any change.

Q. You take the position that when you bargained with these people you bargained to fill three specific jobs?

A. So long as the necessity for them existed, but never since the Lackawanna Railroad was run—

Q. Show me where—

Mr. Davis: Let him answer.

Mr. McEwen: No, I won't. I don't want him to make any speeches.

Mr. Davis: I submit the witness is entitled to answer.

The Court: Let him answer.

A. What I intended to say was, there never has been a question, either with the Telegraphers, the Clerks or any other organization, to my knowledge, about the right of [fol. 134] the Railroad to make reductions in personnel when the requirements of the service are such that we do not need the number of employees that are on the payroll.

Q. Has there been any question about the right of the Company to abolish a job belonging to a specified craft and

distributing the functions of that particular job amongst other crafts?

A. No. The only case I know of is this case here, and this was, as I say, done by agreement.

Q. Is this the only case you know of where the Railroad has met any objection on the part of any of the Brotherhoods when it has abolished a job and spread the functions of that job amongst other crafts or classes of employees?

Mr. Davis: I object to that because it is conclusively shown the functions of Telegraphers were spread amongst other members of the 'Telegraphers' organization.

Mr. McEwen: It has not been shown any such thing.

Q. Do you say you can recall such a dispute on the Road?

A. I do not recall any such dispute, but I will say that even in this case we do not take work we consider belongs to Telegraphers and distribute it to other than Telegraphers. The work we distributed was work that belonged to Telegraphers and that Telegraphers have and are doing it today.

Q. So this contract entitles the Telegraphers to no specific functions, and entitles the Telegraphers to no particular job, and was a mere shibboleth?

[fol. 135] Mr. Evans: I object to "shibboleth."

The Court: Sustained.

Mr. McEwen: That is all.

Re-Direct examination.

By Mr. Davis:

Q. For the benefit of the Court, will you tell us just what a train sheet is?

Mr. Dwyer: He said he doesn't know.

Mr. Davis: You did not ask him.

Mr. Dwyer: Yes, I did.

Q. Do you know what a train sheet is?

A. Yes.

Q. What is a train sheet?

A. It is a sheet prepared in accordance with the requirements of the particular Division, a sheet that is operated by the Train Dispatcher, showing the movement of trains east and west, the engine numbers, the names of the crews,

the time they were called, the time they were released, the time of passing each station, and other information: the weather reports and other data.

Q. Is that a paper that is required to be kept by the Interstate Commerce Commission?

A. It is.

Q. This sheet the Crew Clerks keep at the Elmira Yard, is that a train sheet?

A. I would not call it a train sheet.

Q. What would you call that?

A. Just a Yard record.

Q. Is that something required to be kept by the Interstate Commerce Commission?

A. Not to my knowledge.

Mr. Davis: That is all.

[fol. 136] Re-cross examination.

By Mr. Dwyer:

Q. Who keeps the train sheet?

A. The Train Dispatcher.

Q. Where does he get his information from?

A. A hundred and one different places.

Q. Where does he get his information from concerning Elmira for the reports I have enumerated to you?

A. He may get some from the East End, or may get some from the West End, or from the Crew Clerks who knew it, from the source that can give it to him the handiest and the quickest.

Q. And it is transmitted to him from the sheets the Crew Clerk has before him, isn't that right?

A. Not necessarily.

Q. A large portion of it?

A. No; I would not say a large portion of it.

Q. Prior to 1938 where did they get all that information concerning the operations in the Elmira Yards?

A. They got the information from the men who were employed in there where the telegraph instruments were, and whose prime duties were to telegraph and to use the telegraph, and also to issue train orders at the direction of the Dispatcher, issue clearance cards,

Q. In short, from the Operator?

A. And to perform certain other work.

Q. To be brief about it, it was the Operator, wasn't it?

A. Well, yes.

Q. Why didn't you say "The Operator"?

A. I think I have a right to say that when the work was taken from the Yard office—

Q. All of this work?

A. No, the work that had to do with the direct movement [fol. 137] of trains that was taken and given to others than the Telegraphers' organization, which meant the distribution of that work to others, but that is clerical work.

Mr. Dwyer: That is all.

Witness excused.

PERRY M. SHOEMAKER, duly sworn as a witness on behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Davis:

Q. What is your full name, Mr. Shoemaker?

A. Perry M. Shoemaker.

Q. Are you employed by the Lackawanna Railroad, the plaintiff in this case?

A. I am.

Q. And in what capacity?

A. General Superintendent.

Q. Are you the successor to Mr. Moffatt, who has just previously testified?

A. Yes, sir.

Q. How long have you been General Superintendent?

A. Since January 1, 1943.

Q. Prior to that date what position did you hold with the Lackawanna Railroad?

A. I was Superintendent of the Morris & Essex Division.

Q. Did you hold any other position before you were Superintendent of that Division?

A. Yes; I was Assistant to the President.

Q. Are you past President of the Railroad Superintendents' organization?

A. I am.

Q. Is that a nationwide organization?

A. It is.

Q. What year were you President of that organization?

A. 1941.

[fol. 138] Q. Have you held positions on other railroads?

A. I have.

Q. Will you please state what railroads and what positions you have held?

A. I have been a track laborer on the Pennsylvania; I have been a station laborer and dynamometer assistant; Terminal Yard Master, and General Yard Master on the Erie; I was Research Assistant, and then Superintendent of Freight Transport, on the New Haven Railroad; and I have already testified to my experience on the Lackawanna.

Q. Did you have a Fellowship at Yale University in Railroad Transportation?

A. I did.

Q. As part of your duties as Superintendent of the Morris & Essex Division, and as General Superintendent, did you and do you now handle employee grievances arising under the present contracts between the Lackawanna Railroad and the Clerks' and Telegraphers' organizations, Exhibits 6 and 10?

A. I have handled and still handle grievances arising under those agreements.

Q. And as General Superintendent since 1943 are all grievances brought up under those agreements handled by you, if they are not settled by the Superintendent?

A. That is true.

Q. Are you familiar with the provisions of those two agreements?

A. Reasonably so, yes.

Q. In your dealings with the Telegraphers what has been the generally accepted interpretation of the coverage of the Telegraphers agreement, Exhibit 10?

Mr. Dwyer: I object to the question as calling for a conclusion of the witness.

[fol. 139] The Court: Overruled.

Mr. Dwyer: Exception.

A. The Telegraphers' agreement, known here today as Exhibit 10, covers the positions recognized by the Telegraphers and the Railroad as being under that contract as

of the date of its issuance or its effectiveness, which was May 1, 1940. Some few of those jobs as listed there have since been abolished, and some jobs have been added since that time.

Q. That is, the positions listed in the agreement you are referring to, is that correct?

A. Yes, sir.

Q. Was this matter involving Crew Callers, this grievance handled by you with the Telegraphers?

A. Yes, after I became General Superintendent.

(Letter from Mr. Slocum to Mr. Shoemaker, dated July 24, 1943, marked: Plaintiff's Exhibit No. 16 for Identification.)

Q. Mr. Shoemaker, I show you Plaintiff's Exhibit No. 16 for Identification, and ask you what that is.

A. This is a letter dated July 24, 1943, from General Chairman Slocum of the Telegraphers, addressed to myself, concerning the Elmira case which we are discussing today.

Mr. Davis: I offer that in evidence.

Mr. Dwyer: No objection.

The Court: Received.

(Letter received and marked: Plaintiff's Exhibit No. 16.)

Q. Who handled this grievance with you, Mr. Shoemaker?

A. Vice-president Elliott, and later General Chairman Slocum.

[fol. 140] Q. Do you know whether any employee authorized either Vice-president Elliott or General Chairman Slocum to present this complaint?

A. So far as I have been able to ascertain, no employee has authorized either Vice-president Elliott or General Chairman Slocum to handle this claim for them.

Q. Since you became General Superintendent on January 1, 1943, have there been any Telegraphers on the Buffalo Division on furlough because of lack of work?

A. There have not.

Q. Do you know what happened to the three Telegraphers who were at the Elmira Yard office when the change was made on May 1, 1943?

A. The first trick man, Burrell, and the second trick man, Howard, are both dead. The third trick incumbent, an employee by the name of Orentt, is now working at Bath.

Q. During the time you have been General Superintendent, have you been short of men to fill the positions on the Buffalo Division listed in the agreement, Exhibit 10?

A. We have.

Q. What position does Mr. Orcutt hold at Bath?

A. He is working second trick at Bath.

Q. As a Telegrapher or an Operator?

A. As an Operator.

Q. That is one of the positions listed in Exhibit 10?

A. It is; it is carried as Clerk Operator, second trick.

Q. Have you for some time past been hiring new men to fill the positions on the Buffalo Division listed in Exhibit 10?

A. Yes.

[fol. 141] Q. And is there any Telegrapher on the Buffalo Division with a seniority date prior to May 1, 1938, who cannot hold a regular position?

A. There is not.

Q. Mr. Shoemaker, did you have any discussion with representatives of the Clerks' organization in connection with this Elmira Yard case?

A. Yes, I have.

Q. With whom were those discussions held?

A. With General Chairman Carlo.

Q. About when?

A. About December 9, 1943. That may not be the exact date, however.

Q. Did General Chairman Carlo make any claim at that time?

A. I explained to Mr. Carlo that the Telegraphers' organization were agitating the three positions in the Elmira Yard office, and that in all probability acceding to their request would mean the displacement of the three Crew Callers, since there would not be work enough for two jobs if that were done. General Chairman Carlo told me very definitely that there would be an immediate protest and time slips would be submitted if the Crew Callers were taken off, that the Clerks' organization regarded those positions as their own.

Q. Mr. Shoemaker, is there any other place on the Lackawanna Railroad where Clerks take Consists over the telephone in the same manner as is done in the Elmira Yard?

A. Yes.

Q. Where are those places?

A. Secaucus, New Jersey; Port Morris, New Jersey; Buffalo, New York. They come to my mind at the moment. East Buffalo, I should more properly say.

[fol. 142] Q. Has the Telegraphers organization presented to you any protest in connection with work at those places?

A. They have not.

Q. Do you know how long that has been going on?

A. The practice was in existence when I came with the Lackawanna. How long prior to that, I can't say.

Q. When did you come with the Lackawanna first, Mr. Shoemaker?

A. In May, 1941.

Q. Will you state whether or not some of this information which the Crew Clerks are telephoning to Buffalo could be sent by mail?

A. Certainly it could.

Q. Are there other points on the Railroad where the Crew Release time is given by the Clerk to the Dispatcher?

A. Many of them. I might even say it is the common practice at most points for Crew Release times being given to the Dispatcher by a clerical employee.

Q. For the benefit of the Court, will you explain to the Court what you mean by "Crew Release Time"?

A. Using as an example a freight train arriving in Elmira from Buffalo; the arrival time at the Elmira Yard is considered the time at which the rear end passes the Lehigh Valley tower at Thurston Street. That is more commonly known as the "O.S." and shows on the train sheet as the arrival of the crew at Elmira. The crew is not off duty until they have yarded the train and performed the necessary duties of leaving the train by turning it over to another crew. Then the engine crew at the round-house, and the train crew at the Yard office, register off. And that is [fol. 143] comes the official off duty time, which both terminates the pay and becomes the basic record under the 16 Hour Law, the "Hours of Service Law," as we term it, in connection with the time on duty.

Q. You are familiar with central train control, are you?

A. Somewhat, yes.

Q. That operates switches by electrical impulses, is that correct?

A. Switches and signals.

Q. Does that in some instances replace towers?

A. Yes, it does; it is relatively a common occurrence for it to replace towers.

Q. So that by electrical impulses you are doing work which Towermen formerly performed, is that correct?

A. That is true in many instances, or rather to the extent to which the centralized train control governs switches previously controlled from towers. The normal operation is to combine power controlled switches and hand controlled switches to make a centralized train operation.

Q. Who operates the central train control?

A. Most commonly the Dispatcher. There are some installations in the country in which some other employee operates the levers throwing switches and signals.

Mr. Davis: I think that is all. You may cross examine.

Cross examination.

By Mr. Dwyer:

Q. You have no such systems on the Lackawanna, have you?

A. No, we have not.

Q. You have told us of instances where Clerks take Consists.

A. May I modify my answer to that, so there will be no [fol. 144] confusion in the matter?

Q. Yes.

A. The common terminology of centralized train control, I believe, includes a considerable portion of main track and sidings, the whole route of which has connected signals, and the throwing of switches from a centralized point. We do have many locations on the Lackawanna where switches and signals remotely located are in fact operated and thrown from a central point.

Q. But you have not installed any system uniformly through the road, or anything of that kind?

A. We are approaching that. On the Buffalo Division we have made a start on it.

Q. You have told us of two instances, I think, where Clerks take Consists, and instances where Clerks give release time to Dispatchers. Now that, by and large, is communications touching the operation of a train which are recorded, are they not?

A. Strictly speaking, a release time does not touch the operation of the train. That is a manpower proposition.

Q. That, at any rate, determines your payroll record, isn't that true?

A. Yes, that is true.

Q. The Consist, however, is a message or record which is intimately connected with the operation of the train, on which the Yardmaster makes up his load, and what not, isn't that right?

A. It is more intimately associated with the Yard problems at a terminal head, as to how they are going to yard the train and what is going to be done with it. In other words, it lets the Yardmaster know how he can plan his work.

[fol. 145] Q. It lets him know what he can put on a specific train, is that right?

A. In part, yes.

Q. Do you know of any instance where Crew Clerks in any station handle drill reports, train delays, O S es, consists, reaches, tracers, and other miscellaneous messages which are matters of record, permanent record, affecting the operation of the road, other than Elmira?

A. I do not know of any location, including Elmira.

Q. Don't they do all of that here?

A. No, they do not.

Q. Don't they do a considerable portion of it here?

A. They do some of it, yes.

Q. How much of it do they do?

A. The previous witness testified that roughly one and one-half hours work would cover the things which you have enumerated.

Q. I know, but how many of those things do they regularly handle in the Elmira Yard office?

A. I am puzzled by one term you use. Not to beg your question, but do you mind telling me what you mean by a "drill report"?

Q. As I get it, a drill report is a report of terminal delays, and mechanical delays within a terminal, is that right?

A. Being a former Yardmaster, I would say a drill report is one which would tell a Yard crew what to switch in a train. Presumably, you mean by "drill report" a "delay report."

Q. A delay within the terminal?

A. Within the Yard.

Q. Yes,—and then there are train delays which are delays on the route?

A. That is right.

[fol. 146] Q. And both those reports are reports concerned with the operation of the train, and both reports are made a matter of record at either end of the line, is that correct?

A. Both reports are on file in the Yard office. They are telephoned to the Dispatcher or his Clerk at Buffalo for the daily train delay report, at some time during the day, usually by the Crew Callers, sometimes by the Yardmaster or Tonnage Clerk.

Q. Previously all those messages which I have just enumerated to you, prior to 1938, were handled by the Operators in the Elmira Yard office, were they not?

A. I do not think so, Mr. Dwyer. As you appreciate, I can't answer that from my own personal knowledge of not being there, but if I may say this: in the practical aspect of operating any Yard office you can't build a fence around a job and say "This man is only going to answer Telephone A and work on Sheet of Paper A." There must necessarily be some give and take.

Q. There is necessarily some overlapping?

A. That is right, sir.

Q. And generally in railroading the function of Telegraphers has been, historically, to handle communications which are a matter of record, and to fill in with incidental work, isn't that correct?

A. ~~No~~, I would not say that, for the reason that your definition of a "matter of record" and mine, I suspect, would be very different.

Q. By "matter of record" I mean every message which is sent and recorded wherever received.

A. Most of the information that these Crew Callers transmit by telephone to Buffalo or some other point is read [fol. 147] off from a piece of paper that someone else has prepared and placed in front of them, and that is filed; so it is not taken down again at the giving end.

Q. The Crew Caller does keep the train sheet, or whatever it might be, on the desk before him, doesn't he?

A. He keeps the train record in front of him, primarily for the information of the Yardmaster and for himself.

Q. And he receives some of the information on that sheet from sources over the telephone, and some of the informa-

tion from sources in the Yard, by direct message, that is, personal message either written or oral?

A. Yes.

Q. And whatever information he receives he puts on the sheet and transmits it to the Dispatcher?

A. Only a portion of the information on the sheet at any time is transmitted to the Dispatcher. It is not a terminal record; it is a record for the use of the Elmira office itself.

Q. And in addition to that, he performs the particular duties of the Crew Callers; he takes the reach as given him over the wire and enters it on the train sheet, or whatever the record might be, and he also then calls the actual crew to man the train when it reaches the destination, doesn't he?

A. That is right, with this exception, which is purely technical, that he may call the crew himself, if it is advisable, by telephone, or he instructs the call-boy to go to the house if the man is not available by telephone.

Q. And it is true that the work that is done to get the men on the train is the historic function of the Train Caller, [fol. 148] isn't it?

A. Normally that is the prime function of the Crew Clerk.

Q. And they have incidental duties, to fill in, do they not?

A. The extent to which it is his prime function and occupies his full time depends on whether it is a busy terminal or one which is operating only a few trains, of course.

Mr. Dwyer: I think that is all.

Cross examination.

By Mr. McEwen:

Q. Mr. Shoemaker, I am interested in that discussion you said you had with Mr. Carlo on or about the 9th of December, 1943. As I understood your statement, Mr. Carlo said to you at that time that the Clerks' organization considered those these Crew Clerks' jobs as their jobs, to be filled from members of their craft. Is that understanding correct?

A. That is correct, sir.

Q. Was any conversation had between you with regard to the various functions of the Crew Callers as performed in the Elmira Yard office?

A. Yes, there was a clear understanding between us that these employees were performing both telephone work and crew calling work as such, that they were not strictly a hundred per cent doing crew calling work for their entire tour of duty.

Q. It was your understanding then, was it, that Mr. Carlo was claiming for his organization all of the duties which were then being performed by the Crew Clerks?

A. We did not discuss every individual duty, sir.

Q. Did you have any understanding one way or the other on that point?

A. We had no understanding that some certain percent- [fol. 149] age of the work belonged to the Clerks and some certain percentage to the Telegraphers. Mr. Carlo felt, and I assume still feels, that the predominant part of their work was clerical work.

Q. There was no conversation, however, to the effect it was all clerical work?

A. I would not say that Mr. Carlo said that.

Q. And if it should develop that portions of the work were not, properly speaking, clerical work, and that the Clerks' organization had no objection to the performance of those functions by Telegraphers, would that make any difference in the attitude of the Plaintiff towards this case?

A. I can't see that it would, for it was clearly understood between Mr. Carlo and myself, from our personal knowledge of the work at Elmira, that all the work involved was only enough for one man at a trick.

Q. Is it your understanding that there are certain functions here that are claimed by both organizations?

A. Yes, I would say so, quite definitely.

Q. That is all I think I asked you.

A. Mr. Carlo, I am sure, feels that the predominant part of the work belongs to him. Mr. Slocum has written us that in his opinion 75 per cent of the work belongs to the Telegraphers.

Q. So you feel that the two organizations are claiming the same thing?

A. There is no question about there being a conflict.

Mr. McEwen: That is all.

(Witness excused.)

[fol. 150] Mr. Davis: If the Court please, we rest.

(Plaintiff rests.)

(Recess, 4:10 P. M. to 9:30 A. M. tomorrow, August 7, 1945.)

August 7, 1945. Supreme Court Chambers, Elmira, N. Y., Morning Session Commencing at 9:30 o'clock.

Trial continued at 9:30 A. M.

DEFENDANT SLOCUM'S MOTION TO DISMISS COMPLAINT

Mr. Dwyer: If the Court please, at this time I wish to move for the dismissal of the Plaintiff's complaint, upon the grounds that the Plaintiff has failed to establish a *prima facie* case; and upon the further ground that it now affirmatively appears, from the evidence thus far produced, that there is in existence a dispute as to the jurisdiction of the two Defendant organizations over certain operations on the Plaintiff Carrier's road in Elmira, New York, which was brought about by the Plaintiff in abolishing three positions in the Elmira Yard office and the distribution of the work performed by the employees holding those three positions to various other employees in Elmira.

The Plaintiff's complaint alleges, very briefly that each of these two organizations are certified and recognized as the sole bargaining agents for a certain class or group of employees employed by the Plaintiff, the organization represented by Defendant Slocum being sole bargaining agent [fol. 151] for the class of employees broadly known as "Telegraphers," and more particularly described in the contract, and the organization represented by the Defendant Carlo, the sole bargaining agent for that class of employees known as "Clerks," and described in their contract.

The complaint then alleges that, effective May 1, 1938, the Plaintiff, pursuant to the terms and conditions of the agreement effective January 1, 1929, which was introduced in evidence, and without protest, by and with the express consent of the Lackawanna Division of the O. R. T., acting through its General Chairman, abolished three positions of "Towerman" at the Lehigh Valley tower; and three "Operators" at the Elmira Yard office, and created three positions of "Operator Towermen" at the Lehigh Valley

tower, and transferred the work of the three Towermen and three Operators' positions thus abolished to three "Operator Towermen."

Now pausing right there for a moment, the proof thus far adduced, in my opinion, falls far short of the establishment of the facts alleged in the complaint. In that respect you will recall the only testimony on that proposition was the testimony of Mr. Moffatt, who testified that prior to May 1st he discussed with Mr. Voss, who is now dead, who was at that time General Chairman of the local Division of the Order of Railroad Telegraphers, a proposal to abolish [fol. 152] the three Yard office Operators' jobs, and that Voss concurred in that proposition. I see nothing in the contract, and I think we make no contention, that the Carrier need consult the organization on the abolition of a job as necessity requires it. It is the contention of the testimony offered by the Plaintiff here that the abolition of those jobs was brought about by reason of necessity in economy of operations. Then the testimony clearly indicates that the only work performed by the employees who held the three abolished positions, which was transferred to the L. V. tower, was the work of train orders and clearance cards; that all of the other work which had been performed by the Operators of the Yard office were transferred to other employees.

In support of Mr. Moffatt's contention that Mr. Voss acquiesced in this, Plaintiff's Exhibit 4 was offered in evidence, that being a letter to Mr. Alexander, the Superintendent in Buffalo from Mr. Moffatt, a carbon copy of which was sent to Mr. Voss. I presume your Honor has read it, but I would like to call your attention again to the contents of that letter: "Mr. W. G. Alexander: Answering yours of April 29th, File 40-A, recommending a basic rate of 74 cents per hour for the new Towerman Telegraphers' positions at Elmira, in other words, eliminating the three positions paying 71 cents per hour and transferring the [fol. 153] rates for the three positions from the NB office to the new positions in the tower," and then in other type: "This is approved. I have discussed the change with General Chairman Voss of the Telegraphers' Committee and obtained his concurrence in the change. E. B. Moffatt." That is all that is confirmed in that communication. There is no showing on the part of the Plaintiff that Mr. Voss was empowered or authorized by the organization he rep-

resented to negotiate or effect a change in the contract. There is evidence that all contract negotiations between the Carrier and the O. R. T. was carried on between the management and the General Chairman, together with the General Committee, representing the organization. The burden is upon the Plaintiff to prove the authority of Mr. Voss to make any waivers, if a waiver was made, in this contract, and aside from the lack of authority the testimony concerning the proposition as summed up in that exhibit falls far short of establishing the Plaintiff's case.

Further, it will be seen that at no time prior to a comparatively recent date was the Clerks' organization consulted about this matter, and if the Clerks' organization was not consulted, the effect that this change might have had upon the employees represented by the Clerks cannot be said to have been acquiesced in by anybody.

[fol. 154] Furthermore, as I indicated yesterday, Section Six of the Railway Labor Act requires a notice of 30 days intention to effect a change in an existing agreement or to renegotiate an agreement. That concededly was not had here, and if any existing provision of the 1929 agreement between the Carrier and the Telegraphers' organization was to be effected by this change, as is contended by the Plaintiff, either by way of waiver or renegotiation, it certainly is a change affecting the contract; and I can see nothing, absolutely nothing, to the Plaintiff's contention that this contract is not subject to the provisions of the Railway Labor Act, because it certainly is a contract which falls squarely within the provisions of the Railway Labor Act.

Furthermore, in 1939, this matter was protested by the organization to the Company, and has continuously been protested right up to date, and the Company has taken the attitude with the organization, and takes the attitude today upon the trial, that it is the Company's intention to give to those represented by the Telegraphers' organization all the work which properly belongs to them, and that it was their intention to do so when the 1940 agreement was negotiated, and there is nothing in the 1940 agreement which deprives them of any work to which they were entitled under the 1929 agreement.

[fol. 155] So we come squarely to the proposition that the only thing involved in this lawsuit is a determination as to what of the functions now being performed in the

Yard office at Elmira by Crew Callers, members of the Clerks' organization, are functions which properly should be performed by members of the Telegraphers' organization. That is clear from all the evidence we have heard thus far. That amounts to only one thing: that amounts to a question of the jurisdiction of each of these organizations under its respective contract with the Plaintiff.

A jurisdictional dispute, whether brought to a head by the Plaintiff or brought to a head by one of the organizations, is still a jurisdictional dispute. That is the only question involved in this lawsuit, and that is a question which this Court nor any other Court has any jurisdiction to handle. That is a question which only can be decided under the machinery created and set up and operating under the Railway Labor Act.

I wish to call your Honor's attention to two United States Supreme Court cases: one, *The General Committee of Adjustment of the Brotherhood of Locomotive Engineers for the Missouri-Kansas-Texas Railroad vs. The Missouri-Kansas-Texas Railroad Company*, 320 U. S. 323. That action was brought by the Engineers against the Company to [fol. 156] determine the authority of itself, that is, the Engineers, and of the Brotherhood of Locomotive Firemen and Enginemen, under their respective contracts with the Carrier. There, there was a petition for a declaratory judgment, and there the Court said:

"It seems to us plain that when Congress came to the question of these jurisdictional disputes, it chose not to leave their solution to the courts. As we have already pointed out, Congress left the present problems far back in the penumbra of those few principles which it codified. Moreover, it selected different machinery for their solution. Congress did not leave the problem of interunion disputes untouched. It is clear from the legislative history of Section 2, Ninth, that it was designed not only to help free the unions from the influence, coercion and control of the carriers but also to resolve a wide range of jurisdictional disputes between unions or between groups of employees. However wide may be the range of jurisdictional disputes embraced within Section 2, Ninth, Congress did not select the courts to resolve them. To the contrary, it fashioned an administrative remedy and left that group of disputes to the National Mediation Board. If the present dispute falls

within Section 2, Ninth, the administrative remedy is exclusive. If a narrower view of Section 2, Ninth, is taken, it is difficult to believe that Congress saved some jurisdictional [fol. 157] disputes for the Mediation Board and sent the parties into the federal courts to resolve the others. Rather the conclusion is irresistible that Congress carved out of the field of conciliation, mediation and arbitration only the select list of problems which it was ready to place in the adjudicatory channel. All else it left to those voluntary processes whose use Congress had long encouraged to protect these arteries of interstate commerce from industrial strife. The concept of mediation is the antithesis of justiciability.

"In view of the pattern of this legislation and its history the Command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforceable in the courts should be implied. Unless that test is met the assumption must be that Congress fashioned a remedy available only in other tribunals. There may be as a result many areas in this field where neither the administrative nor the judicial function can be utilized. But that is only to be expected where Congress still places such great reliance on the voluntary process of conciliation, mediation and arbitration. Courts should not rush in where Congress has not chosen to tread."

In other words, unless we can find here something explicit in the Railway Labor Act which takes this dispute out of the functioning of the machinery of the Railway Labor [fol. 158] Act, the United States Supreme Court says the Courts should not rush in where Congress has not chosen to tread.

That case was followed by another case, *The General Committee of Adjustment of the Brotherhood of Locomotive Engineers for the Southern Pacific Lines, Etc., vs. Southern Pacific Company and The Grievance Committee of the Brotherhood of Locomotive Firemen and Enginemen, and The General Grievance Committee of the Brotherhood of Locomotive Firemen and Enginemen vs. The General Committee of Adjustment of the Brotherhood of Locomotive Engineers for the Pacific Lines of the Southern Pacific Company, Etc.*, 320 U. S. 338; both cases being decided in 1943. There again was an action for a declaratory judg-

ment concerning the jurisdiction of each of these organizations involved in the action. There the Court said:

"We are concerned only with a problem of representation of employees before the carriers on certain types of grievances which, though affecting individuals, present a dispute like the one at issue in the Missouri-Kansas-Texas Railroad Company case. It involves, that is to say, a jurisdictional controversy between two unions. It raises the question whether one collective bargaining agent or the other is the proper representative for the presentation of certain claims to the employer. It involves a determination [fol. 159] of the point where the exclusive jurisdiction of one craft ends and where the authority of another craft begins. For the reasons stated in our opinions in the Missouri-Kansas-Texas Railroad Company case and in the Switchmen's Union of North America case, we believe that Congress left the so-called jurisdictional controversies between unions to agencies or tribunals other than the courts. We see no reason for differentiating this jurisdictional dispute from the others. Whether different considerations would be applicable in case an employee were asserting that the Act gave him the privilege of choosing his own representative for the prosecution of his claims is not before us."

We cannot say that the employer is in the position of an individual employee, and apparently from the reading of the last case that is the only instance in which the Supreme Court might consider that the provisions of the Railway Labor Act must not be complied with, and then your Honor will infer that perhaps then they would not so hold.

We have nothing here to have a determination of which of these two organizations has jurisdiction of the functioning of those positions in the Elmira Yard office now held by the members of the Clerks' organization. The entire lawsuit is based upon that. The Plaintiff says that in order to determine that he must jeopardize himself, although since [fol. 160] 1939 the Carrier has had ample notice of the fact that this dispute has been raised and has been pressed for solution, has negotiated a new contract, and has not moved one step in the direction of a solution. And I submit, that under all the circumstances this Court, in the first place, cannot treat the situation, and in the second place, this Court should not treat the situation, because the situation is of

the Plaintiff's making, and he is not now entitled to come into equity and make available to himself an unusual remedy to solve a situation which the United States Supreme Court says has no place here but must follow the ordinary pattern laid down by statute.

Mr. Hassenauer: May it please the Court, I desire to call your Honor's attention to one paragraph in particular of this petition for a declaratory judgment. The allegation appears in Paragraph 30 of the petition, in which the Plaintiff states it had no adequate remedy at law, that the National Railway Adjustment Board, created under Section Three of the Railway Labor Act, does not permit the Plaintiff in this case to bring in, under a dispute filed with that Board, these two organizations, and that the Adjustment Board would not have jurisdiction to hear disputes between a Carrier and the two organizations appearing on the other side.

There is no evidence presented to your Honor in the [fol. 161] Plaintiff's case yesterday in which they referred to any effort having been made by the Carrier to appeal to the National Railway Adjustment Board, as is their right under the Railway Labor Act, for relief in this case. Section Three of the Railway Labor Act, creating this Adjustment Board, provides that where a dispute has been handled on the property of the Carrier up to and including the chief operating officer, and the parties have been unable to get together across the conference table and adjust such a dispute, that either party may appeal to the National Railway Adjustment Board and ask for relief in the form of an interpretation of the agreement which is in dispute between the contending parties.

Now there is absolutely no evidence here to show that the Plaintiff does not have an adequate remedy under the Railway Labor Act, either under Section Three or under Section Two of the Act, when he could have invoked the services, in this jurisdictional dispute, of the National Mediation Board, which was referred to by Mr. Dwyer in the argument. It is true that the National Mediation Board has jurisdiction over cases involving representation, ordinarily the representation disputes which might be made by two contending organizations as to who represents certain employees, who may appear in either craft or class. Neverthe-

less, where we have a dispute such as this, it is apparent [fol. 162] that the Carrier, under the Railway Labor Act, could have invoked the services of the National Mediation Board, and had it done so, the National Mediation Board would have sent a Mediator on the property, and called on these parties to get together and adjust the dispute across the conference table.

There is no evidence in this record that any such request was made by this Carrier under the Railway Labor Act. Had it made the request or invoked the services of the Mediation Board, we might not be appearing before your Honor and taking up your Honor's time in this case. I am inclined to believe, from long experience under the Railway Labor Act, that an adjustment of this case could have been had, and it could have been an amicable agreement between all the parties to the dispute. But for the Plaintiff to fetch the dispute in a court of law, contrary to the Railway Labor Act, and contrary to the purposes of the Railway Labor Act, is only to antagonize these parties, one against the other, and instead of trying to effect an amicable solution of this dispute it is causing these parties to become antagonized, and necessarily to embroil the Carrier in further disputes.

This obviously is a jurisdictional dispute. If it were not a jurisdictional dispute the Clerks' organization or the Telegraphers' organization, as the case might be, would not be here before your Honor. They have sued both organizations [fol. 163]. They are asking an interpretation of both agreements with both organizations by your Honor, and we submit that while these cases which have been referred to by Mr. Dwyer in his argument may have involved representation matters which are within the jurisdiction of the Mediation Board, there is a case very recently decided in St. Louis by another Court, in which Mr. McEwen here was Counsel for the Clerks, and in which he succeeded in having the Court dismiss the petition for a declaratory judgment which was brought against the Clerks and a Carrier by the Order of Railroad Telegraphers. I was not a party of record in that case. Mr. McEwen is fully acquainted with the facts and will undoubtedly present the facts to your Honor, explaining the results of that decision. But I want to emphasize to your Honor that Congress has set up two administrative Boards, under the Railway Labor Act, to ad-

just disputes such as we have here in this case, and for the purpose of adjusting them in a manner which will make for a better understanding between the organizations and the employer. No good certainly could come from a lawsuit such as this, regardless of who might win this case. There is not going to be an amicable disposition of this dispute if your Honor should declare or interpret the agreement of either organization as against the contention of the other. [fol. 164] Congress has set up these administrative Boards to try and bring these parties together across a conference table with the Carrier and endeavor to adjust the dispute. That was the declared purpose of Congress. And as stated in the United States Supreme Court, in the M-K & T case, by Justice Douglas: "Mediation is the antithesis of justiciability." That means one thing, that when Congress has set up an administrative Board, composed of men appointed by law and informed by experience, that that is the remedy which the employer as well as the employee should follow; and we submit, your Honor, that in view of the lack of evidence in this case to show that any effort was made by the Carrier to pursue this remedy under the Railway Labor Act, that the motion to dismiss the petition for a declaratory judgment should be sustained.

DEFENDANT CARLO'S MOTION TO DISMISS COMPLAINT

Mr. McEwen: May it please your Honor, in behalf of the Defendant Carlo, representing the Railway Clerks, we wish to join in the motion to dismiss. I do not know that any useful purpose is going to be served by arguing further at great length on the issues raised by this motion. I think the points have been reasonably well outlined. There were, however, a few matters I would like to discuss.

If it please the Court, in the first place, we have talked a good deal about the Railway Labor Act, and I do not think [fol. 165] anybody really yet has explained to the Court what the purpose and background of that statute is. We in the railroad industry are pretty proud of it. Nobody thinks it is perfect but the organizations are very much pleased with its operation and I think—I am not trying to speak for the opposition, but I think the Carriers are equally pleased, and I think those in Government who have had an opportunity to work with and sponsor and assist in the development of that legislation are equally proud of their accom-

plishment, because it has produced that statute and the machinery set up by it, and the parties in their cooperation with that machinery have produced an era of industrial peace in the railroad industry which is not paralleled to my knowledge in any major industry in the country.

The Railway Labor Act goes back for its roots many, many years. Congress first started to experiment with the idea, a then very novel idea, of trying to arrange some kind of machinery to prevent industrial labor disputes on the railroads, away back in the last century. The first efforts seem rather pathetic today. Certainly they were not very successful. But the point I wish to emphasize throughout this brief discussion is that they started in with the idea of making the whole system a voluntary proposition. It was not designed to force anybody. It was designed to make [fol. 166] agreement possible and make settlement by agreement as easy as could be done, and that same idea followed through, in statute after statute, beginning back I think in 1888, and finally was developed in its highest form, for that time at least, in 1920 by the Transportation Act of that year, and that Act, for the first time, set up permanent tribunals, and made arrangements for other tribunals to be set up by agreement, which it was hoped would settle all this kind of disputes and grievances between the parties. Those tribunals, as set up by the Transportation Act of 1920, were the United States Labor Board and certain Adjustment Boards, which were provided for by agreement. They were all voluntary tribunals, in the sense that it was never expected that any of those bodies could issue decisions which were legally binding upon anybody except as the parties might agree in advance they would be legally bound by such a decision. That arrangement did not work too well because there were parties on both sides of the fence who took advantage of the fact that there were no legal obligations.

That Act was repealed when the Railway Labor Act was first enacted, in 1926. The Railway Labor Act of 1926 continued on the same basis to make voluntary agreement and voluntary settlement its prime objective, but reinforced its provisions with certain legal obligations which in that Act [fol. 167] were designed to secure adequate representation for employees without interference from employers.

And so we come to the Act of 1934. The Act of 1934, the Supreme Court has said—and I think correctly, is based on the same fundamental premise. It is desired that voluntary arrangements be encouraged as much as possible. The Act establishes two tribunals. The National Mediation Board and the National Railway Adjustment Board. The Mediation Board, as its name indicates, is primarily a mediation agency. It does not decide things; it mediates them and endeavors to get the parties into agreements. There is one exception to that; it can actually decide a dispute where there is a question as to who has representation of a certain class of employees. The Adjustment Board decides cases of grievance disputes involving the obligations of collective bargaining agreements, and its decisions are enforceable only by suit brought in the United States District Courts.

Nobody pretends, and the Supreme Court does not pretend in the cases that were read here, that the Railway Labor Act contains administrative machinery for the settlement of every dispute which can possibly arise. Rather, the thought of the Court is expressed in its opinion that there are some disputes which are left in the field of, as the Court expresses it, conciliation. That is, the parties are encouraged to get together and settle, but there is no machinery provided whereby they have to settle. The alternative of non-settlement is industrial warfare with the economic weapons which the parties have. That is the ultimate means of settlement, and the Court so recognizes, but the Court still feels, regardless of that fact, that the procedures of the Act, incomplete though they may be, some stopping at solution, some going to mediation, some to arbitration, and so on, that those procedures are exclusive, that Congress has acted, that it has said: "This is the means to be adopted in settling these disputes in the railroad field; this is the means we have provided; and this is the means which is to be used exclusively, without reference to judicial procedure." That the rights created by the Act are not judicially enforceable unless the Act specifically provides that they are, or unless the enforceability can be assumed from the whole scheme of the Act.

In the case to which Mr. Hassenauer referred, but which has not been yet reported, in a United States District Court, in the District Court, Eastern Division of Missouri, the facts

were somewhat similar to the facts in the M-K-T case, in that an action was brought by the Order of Railway Telegraphers, asserting that as to certain work belonging to the Telegraphers there was an attempt being made by the Clerks to appropriate that work to themselves through [fol. 169] agreement with the Carriers. In other words, it was, so far as I can see, exactly the same situation as we have here, except the parties were in a little different order. The statement was made, as here, that as to certain work one organization claims it and another organization claims it. That is exactly the same situation that is before your Honor. Both witnesses for the Carrier on cross examination said it was their understanding that the two labor organizations were each seeking the right to perform, and claiming the right to perform, the same identical work.

In that case the District Court ruled that the controversy presented was a jurisdictional dispute within the meaning of the language of the M-K-T case, and goes on as follows:

"We have stated in some detail, not only the history of the controversy submitted to this court in this action, but the interpretation placed on that controversy by the plaintiffs, because in our judgment it leads to but one conclusion, that Count One of the complaint pleads a jurisdictional dispute between two railroad unions, and the record confirms the cause as pled. To determine this issue, what is necessary? A finding must be made as to the extent of the jurisdiction of the Telegraphers' Union over clerical work, under its collective bargaining agreement with the carriers, and a like finding as to the extent of the jurisdiction of the defendant Clerks' Union over clerical work, under its collective bargaining agreement with the carriers. Manifestly they overlap. Can the respective domains of two overlapping unions or crafts be litigated and decided in this character of action in a federal court? We think the question thus presented is governed by the decision of the Supreme Court in the case of General Committee vs. M-K-T R. Co., 320 U. S. 323."

I will not burden your Honor by reading further from that decision. It is here for your Honor's inspection if you care to see the decision.

We believe the whole policy and purpose of the Railway Labor Act is challenged in this case that is here. That is

why we are making a defense to this action. We do not believe this Court or any other Court, state or federal, has a jurisdiction over a controversy of this kind. It is not a justiciable controversy. It is one that should be worked out by reference to the processes of the Act, and I agree with Counsel for the Telegraphers that it could be worked out if a *bona fide* effort was made to do so by the use of those processes.

PLAINTIFF'S ARGUMENT ON MOTION

Mr. Davis: May it please the Court, this case was commenced some time ago, and immediately after it was commenced a motion was made, to remove it into the federal court, before Judge Personius. On that motion the attorneys for the Order of Railroad Telegraphers advanced the argument that the provisions of the Railway Labor Act set up a complete system for the adjustment of disputes involving grievances arising out of the interpretation of collective bargaining agreements. They also advanced much the same argument, with the exception of the argument in connection with the Mediation Board, which has been advanced here this morning. Judge Personius held that this was a case which did not involve the Railway Labor Act, was not a cause of action under the Railway Labor Act, but was an action for the construction of contracts between the parties. There was no appeal taken from that decision, but Judge Knight allowed the case to be removed to Federal District Court for the Western District of New York, where the Order of Railroad Telegraphers made a motion to dismiss the case and the plaintiff made a motion to remand it. Three extensive briefs were filed with Judge Knight by the attorneys for the Telegraphers, and in one of them, after quoting extensively from the brief in much the same manner as has been done here this morning, the attorneys argued that the foregoing allegations definitely called for an interpretation of the provisions of Section Three, First, of the Railway Labor Act, creating the Adjustment Board, its jurisdiction to hear, [fol. 172] decide, and render awards in disputes, and so forth. In one of the three briefs filed in that case, they argued the plaintiff here seeks interpretation of the Telegraphers' agreement, to the exclusion of the right guaranteed that organization and others of the railway organiza-

tions to have collective bargaining agreements interpreted by the National Railway Adjustment Board.

Judge Knight, as your Honor knows, denied the Telegraphers' motion to dismiss the case, and remanded it back to the state court, and said: "The only issue is the interpretation of the contract."

Your Honor undoubtedly recalls the motion that was made before you for the dismissal of this case, and the result of that, and also the result of the appeal to the Appellate Division, affirming, in which case the argument was advanced that the Court did not have jurisdiction, that it was a case which should have gone to the National Railroad Adjustment Board.

It seems very clear to me that the issue in this case is an interpretation of the contract, and in connection with that interpretation we have the agreement made by Mr. Moffatt, the General Superintendent, with Mr. Voss, General Chairman and highest official of the Telegraphers organization, in the latter part of April, 1938. We also have the agreement which Mr. Moffatt made with Mr. [fol. 173] Chadwick, General Chairman of the Telegraphers organization, and the General Committee, in December of 1939. As to the first agreement there seemed to be adequate consideration: the rate was increased from 71 to 74 cents an hour. And the second agreement was a settlement of some 17 or 18 cases, all lumped together.

I think you will recall the letter Mr. Chadwick wrote back to Mr. Moffatt, accepting, in which he says: "This will acknowledge receipt and acceptance by our General Committee of your letter dated December 2, 1939, covering the 18 cases under dispute. On behalf of our General Committee I desire to express to you our appreciation for the favorable decisions rendered in our favor. Very truly yours, O. L. Chadwick."

This morning, and yesterday, the Telegraphers raised a point which has not been pled in their answer, and that is the Railway Labor Act. Where you have an action such as this for the mere construction of contracts, it seems to me that where you rely upon a statute, that the statute must be affirmatively pleaded in the answer. However that may be, they referred to Section Two, Ninth, and the decisions of the United States Supreme Court in two cases, one involving the Southern Pacific lines and the other involving the Missouri, Kansas & Topeka.

Section Two, Ninth, of the Railway Labor Act says: "If [fol. 174] any dispute shall arise among a carrier's employees as to who are the representatives of such employees," and so forth. That is all that section involves, as to who represents a certain class of employees, and that is all that is involved in the two United States Supreme Court cases which Mr. Dwyer has called to your attention. In one case there was a question as to who was the bargaining agent for the Locomotive Engineers. Locomotive Engineers are promoted Firemen. There is an organization called the Brotherhood of Locomotive Firemen. When the Firemen are promoted to Engineers they may still maintain their membership in the Firemen's organization. There is also an organization known as the Brotherhood of Locomotive Engineers. The dispute in these cases was a jurisdictional dispute as to representation, as to whether the Brotherhood of Locomotive Engineers or the Brotherhood of Locomotive Firemen was the sole bargaining agent for Locomotive Engineers. And in the Southern Pacific case, that was an action to declare an agreement as being invalid under the Railway Labor Act. The Railway Labor Act was directly involved in that case. In the M K T case, it was for a declaratory judgment that the mediation agreement between the defendants was in violation of the Railway Labor Act, and that the plaintiff should be declared to be [fol. 175] the sole representative of the Locomotive Engineers. That issue is not in this case.

The only issue in this case is to interpret the contracts and to see whether the work which the Crew Callers are doing falls within the Clerks' agreement or whether it comes within the Telegraphers' agreement. Mr. Moffatt testified that there is no rule in the Telegraphers' agreement which defines the kind of work which Telegraphers must do. He said the agreement covered positions. You will recall that in the 1929 Telegraphers' agreement, Exhibit 1, that there were positions listed at the Elmira Yard of Operators, that there were positions listed at the Elmira tower or Lehigh Valley tower, of Towermen. You will recall that the positions of the Operators were abolished, and that the positions of the Towermen were reclassified to "Operator Towermen," under agreement with Mr. Voss as General Chairman. Mr. Chadwick was Mr. Voss's successor as General Chairman. Mr. Chadwick negotiated the agreement of May 1, 1940, Exhibit 10. He signed that agreement. He

says the Telegraphers maintain, that they were protesting the reclassification of the jobs and the removal of the Operators at the Yard office, yet in the list of positions in the May 1, 1940 agreement, what do you find? You find a confirmation of the agreement made with Mr. Voss, in that [fol. 176] at Elmira Yard you have three "Operator Towermen" with a 74 cent rate.

It seems to me, with the law of this case as decided in four decisions, that the only issue here now is for the construction of these two contracts, and that the other issues which the attorneys for the Telegraphers and Clerks are raising have already been passed on adversely to their contention by not only Judge Personius, whose decision was unappealed, but by Judge Knight, whose decision was unappealed, and by your Honor, whose decision was affirmed by a unanimous Court in the Third Department, Appellate Division.

The Court: Motions denied.

Mr. Dwyer: Exception.

Mr. McEwen: Exception.

CASE OF DEFENDANT SLOCUM

ORVILLE L. CHADWICK, duly sworn as a witness on behalf of the Defendant Slocum, testified as follows:

Direct examination.

By Mr. Dwyer:

Q. What is your full name, Mr. Chadwick?

A. Orville L. Chadwick.

Q. What is your occupation?

A. Present occupation is first trick Clerk Operator at Norwich, N. Y., and Local Chairman of the Order of Railroad Telegraphers.

[fol. 177] Q. Do you live in Norwich?

A. I do.

Q. How long have you been employed by the Plaintiff D. L. & W.?

A. Since May 4, 1916.

Q. What positions have you held with the Road?

A. Various positions: Operator, Agent, Agent Operator.

Q. In all of those positions have you been one of the class of employees covered by the 'Telegraphers' contract.

A. Yes, sir.

Q. And a member of the Telegraphers' organization?

A. Yes, sir.

Q. Of course the Telegraphers do not have a closed shop with the Plaintiff Road?

A. Unfortunately not.

Q. How long have you been an officer in the Order of Railroad Telegraphers?

A. Since April, 1927.

Q. Was there a time when you were the General Chairman of the Delaware, Lackawanna & Western Division?

A. Yes, sir; I was General Chairman from late March, 1939, to the first part of January, 1943.

Q. Since then, and during that time, you also were local Chairman of your own Division on the Road?

A. Yes, sir.

Q. When you became General Chairman were you aware of the existence of the dispute between the Road and the organization concerning the operation of the Elmira Yard office?

Mr. Davis: I object to that as incompetent, improper, and immaterial. He says "aware of the dispute." That assumes a dispute existed.

[fol. 178] Mr. Dwyer: It has existed. I have shown it existed.

The Court: Overruled.

Mr. Davis: Exception.

A. I was aware of such a dispute.

Q. And had you participated in discussions of that matter in the organization prior to the time you became General Chairman?

Mr. Davis: I object to that. A discussion in the organization is not binding on this Plaintiff.

The Court: Overruled.

Mr. Davis: Exception.

Q. Had you participated in such discussions as a member of the organization?

A. May I ask: do you refer to the Elmira Yard case?

Q. Yes. I do not want your discussion, but had you, as a member of the organization and Local Chairman of your

own Division, participated in discussions within the organization of the Elmira situation prior to the time you had become General Chairman?

A. Yes, sir; I had.

Q. So that when you became General Chairman on March 25, 1939, you were generally familiar with the situation?

A. Yes, sir.

Q. As Local Chairman of your own Division, prior to March, 1939, you were a member of the General Committee, were you?

A. Yes, sir.

Q. And is it that Committee, in conjunction with the General Chairman, which negotiates contracts between your organization and the Carriers?

[fol. 179] Mr. Davis: I object to that because the agreements are signed by the General Chairman, if the Court please, both these agreements: Exhibit 1, signed by M. M. Farley, General Chairman, and Exhibit 10, signed for the Telegraphers by O. L. Chadwick, General Chairman.

Q. And also as General Chairman from time to time do you participate in the adjustment of disputes with the Carrier, and did you prior to March, 1939?

A. Yes, sir.

Q. And in the functioning of the organization is it required and was it the practice, during the entire time you were Local Chairman or General Chairman, that matters requiring adjustment, other than trivial matters, are adjusted through the General Chairman after action upon same by the General Committee?

Mr. Davis: I object to that. I do not see how that is binding on this Plaintiff, as to what their practice or requirement was. We have no knowledge of that.

The Court: Overruled; we will take it.

Mr. Davis: Exception.

A. Yes, sir.

Q. You participated in the negotiation of the 1940 contract with the D. L. & W., did you?

A. I did.

Q. And did the entire General Committee participate in those negotiations?

A. That is right.

Q. And you executed the contract on behalf of the organization after the negotiations with the General Committee had been completed?

A. That is correct.

[fol. 180] Q. And did the General Committee pass upon that contract?

A. They did.

Q. Prior to the time when the contract was negotiated and executed, as you have stated, you were familiar with this Elmira situation?

A. Yes.

Q. Who had you discussed that situation with representing the Road, prior to the negotiation of the contract, through the period of time that you were General Chairman?

A. Prior to the negotiation of the 1940 agreement?

Q. Yes.

A. I had discussed it with the Division Superintendent at Buffalo. I believe at that time that was Mr. W. G. Alexander. And also with Mr. E. B. Moffatt, General Superintendent.

Q. With whom did you negotiate the 1940 agreement?

A. Mr. Moffatt, General Superintendent.

Q. And there had been various exchanges of correspondence between you and Mr. Moffatt concerning this Elmira situation prior to the negotiation of the 1940 agreement, had there not?

A. That is correct.

Q. Now tell me this before we go any farther: As General Chairman did you from time to time enter into the adjustment of disputes between the Road and your organization concerning the functioning or operation of various jobs on the Road?

A. That is correct.

Q. And did you in the course of those adjustments arrive at or attempt to arrive at with the management, in conjunction with your Committee, a determination as to whether or not certain functions performed by various employees were functions which under the agreement then in existence, either the 1929 or the 1940 agreement, were functions which came within the jurisdiction of your organization?

A. Yes, sir. I would like to qualify that answer.

Q. Go ahead.

A. I have repeatedly, during the time I was Chairman, insisted with this management that communications of record were absolutely the property of the Order of Railroad Telegraphers and its employees.

Q. In doing that did you and the management discuss the detailed operation of a position to determine where the jurisdiction arrested?

A. More or less; yes, sir.

Q. That is, go on and describe!

Mr. Davis: Let us find out when these discussions were had and with whom they were had.

Q. Can you recall a specific example when you were discussing a particular job?

A. November 9, 1939, that matter was discussed in Scranton, Pa., with the General Superintendent.

Q. What position?

A. Several positions in dispute: Elmira Yard office; East Buffalo Yard office,—which is a case in dispute over communications of record.

Q. Let me call your attention to a letter dated November 26, 1939, addressed to F. B. Moffatt, General Superintendent, signed Orville Chadwick (indicating)?

A. I did.

[fol. 182] Mr. Dwyer: I offer the letter in evidence.

Mr. Davis: I object to it, if the Court please, on the ground they were negotiations prior to December 1, 1939, when a definite agreement, which was the subject matter of the letter now offered, was consummated.

Mr. Dwyer: You claim it is a definite agreement. I claim it is not. That is one angle of this whole business all the way through on all disputes. My theory, if I might explain—

Mr. Davis: That is the acceptance, December 4, 1939, which was in reply to Mr. Moffatt's letter of December 2nd, and the letter he now offers is a letter which was in the negotiations leading up to this settlement.

Mr. Dwyer: That certainly is pertinent.

Mr. Davis: You have a final settlement of this. I think that is a matter of the prior negotiations, which is not competent.

Mr. Dwyer: My theory, if I might explain it, is this: This is a single contract between the Carrier and this organization affecting every job on the Road which is or might be claimed to be within the jurisdiction of the Telegraphers. Mr. Moffatt yesterday testified to a great variety of things in general language, and amongst which were [fol. 183] methods of procedure, and I now intend to show that this Elmira situation is but one of many situations which have been discussed from time to time between the Carrier and the organization; that the Elmira situation has been discussed in the same way as other situations arising of a similar nature, and show to the Court that the contract between the parties, so far as jurisdiction is concerned, depends upon what is known as the Scope Rule of the contract, and that the rates of pay on M. E. Division listed in the back of the contract is simply a Rate Schedule and nothing more, that the contention of the Plaintiff, that that is the controlling factor in the contract, is not the fact; and I think all this is pertinent on that proposition.

The Court: Overruled; I will receive it.

Mr. Davis: Exception.

Mr. Dwyer: I wish to call your Honor's attention to the fact that there are various notations on this letter which were on it when it was handed to me by Counsel for the Plaintiff. It was presented to me in response to a notice to produce.

Mr. Davis: You are only offering the type portion?

Mr. Dwyer: That is all.

The Court: Received.

(Letter of November 26, 1939, Mr. Chadwick to Mr. Moffatt, received and marked: Defendant's Exhibit C.)

[fol. 184] By Mr. Dwyer (Continuing):

Q. I call your attention to that portion of this letter which states: "Cases 6 and 7, East Buffalo and Elmira Operators. We will accept this proposition, with the understanding that as future developments warrant we are privileged to reopen these cases, and desire that all regular message service be performed by Operators." Will you tell us what discussion was had which resulted in that understanding?

Mr. Evans: I object to "understanding."

Q. Well, that "statement" to you?

Mr. Evans: I do not object to that.

Q. Go ahead.

A. The discussions were along the line that the positions belonged to us, and the management took the position they did not belong to us, and we could not arrive at any agreement or settle the case.

Q. Let me ask you this: did you discuss the positions in detail?

A. We did.

Q. And what was that discussion?

A. That discussion was along the duties of the positions.

Q. The detail duties?

A. The detail duties of the position,—in which it was shown that the positions were being handled at that time by Crew-Call Clerks, that they were handling duties that belonged to our craft, such as working with the Dispatcher handling train consists, train delay reports, and reaches and giving information on the crews, who they consisted of, engine numbers, and so forth,—in fact all the details regarding the duties of the positions.

[fol. 185] Q. Prior to that I show you a letter dated September 4, 1939, addressed to Mr. E. B. Moffatt, General Superintendent, signed O. L. Chadwick, and ask you if you wrote that letter?

A. Yes, sir.

Mr. Dwyer: I offer that letter in evidence.

Mr. Davis: I am going to object to the letter on the ground it is a self-serving declaration. I have no objection to the letter going in to show a letter was written on that date to Mr. Moffatt by Mr. Chadwick. I certainly do not want to consent to some of the statements made by Mr. Chadwick in connection with this case.

Mr. Evans: They are arguments rather than statements of fact.

Mr. Dwyer: It is pertinent, in the light of Exhibits 7 and 15 offered by the Plaintiff, and subsequent correspondence offered by the Plaintiff.

The Court: We will receive it for what it is worth.

Mr. Dwyer: It is offered for the purpose of showing there was a dispute, and the nature of the dispute, not to establish the facts referred to in the correspondence.

The Court: Received for that purpose.

Mr. Dwyer: This carbon was attached to and inclosed in the letter (indicating).

Mr. Davis: O. K.

[fol. 186] (Letter of September 4, 1939, Mr. Chadwick to Mr. Moffatt, received and marked: Defendant's Exhibit D.)

By Mr. Dwyer (Continuing):

Q. And was the situation as you outlined it in the letter discussed in your conference of November 9th, by you and whoever else was in the party to the conference?

A. Yes, sir.

Q. Who attended that conference, do you recall?

A. For the Carrier: Mr. Moffatt and Mr. A. L. Rogers; for the Order of Railroad Telegraphers: The Committee, consisting of R. D. West, A. F. Kelly, and H. M. Boehmer, Local Chairmen, and myself as Local and General Chairman.

Q. Then were there any further conferences after November 9th and the letter of November 26th, which is Exhibit C, prior to the receipt by you of Plaintiff's Exhibit 8?

A. I do not recall anything else.

Q. And so far as Elmira is concerned, Plaintiff's Exhibit 8 reads as follows: "Elmira Yard Operators: Present arrangement to be continued until such time as grade crossing project is completed, when present tower Operators will be transferred to the Yard office"?

A. That is right.

Q. What discussion was had about the Yard office in this conference and the prior conferences in which you took part?

A. November 9th?

Q. Yes.

A. We had discussion along the lines that the positions belonged to us, and it was gone into in detail as to the [fol. 187] duties that were performed there by the men on the positions, and we contended, of course, that the men on the jobs were doing work which absolutely belonged to our craft.

Mr. Davis: I ask that the word "absolutely" be stricken out.

The Court: Strike out "absolutely."

A. (Continuing) That the work belonged to our craft. That communications of record, as I recall it, was one of the chief contentions, our organization maintaining that communications of record service belongs to our craft. Such has been proved in many instances in Adjustment Board decisions.

Mr. Davis: I move that be stricken out.

Q. Was that in the conversation?

A. Yes, sir.

Mr. Dwyer: It is part of the conversation.

The Court: If he is repeating the conversation, all right, or giving the substance of it.

A. (Continuing) The Carrier's representative, Mr. Moffatt, on that occasion, on previous occasions, and on subsequent occasions, always maintained that the only work that belonged to the Telegraphers, practically speaking, was train orders, O-S-ing, and clearance cards; and that is not the fact of the case, according to all records and reports.

Mr. Davis: I ask that be stricken out.

Mr. Dwyer: I consent.

The Court: Strike it out.

[fol. 188] Q. Do not give us any of your own conclusions. Just because Mr. Moffatt did yesterday, do not let that be a bad example. Give us facts instead of conclusions.

A. I should have learned yesterday. Has that all been stricken out?

Q. No, just your conclusion. But that is the substance of your conversation with these people at that time?

A. That is right.

Q. In all of your own conversations with any part of the management during this dispute in which you participated, did you and the others representing your organization while you were present discuss the thing along that same line?

A. Yes, sir.

Q. Did you ever discuss with Mr. Moffatt, or anybody else representing the management, or hear anybody representing your organization discuss with the management, the proposition that the only thing included within your contract were jobs listed in the Rate Schedule attached to the contract?

A. No, sir.

Q. Did you ever hear that discussed?

A. No, sir.

Q. By Mr. Moffatt or by any other person?

A. No, sir.

Q. Did you ever hear that contention put forth until you heard it yesterday in the courtroom?

A. Never in my life.

Q. After the correspondence, we have just referred to through 1939, and the conference of November, 1939, when did you commence negotiations for the contract of 1940, do you recall?

A. The only thing I can go by, I believe the evidence [fol. 189] showed yesterday we started negotiations January 12, 1940. I think that is the correct date.

Q. So far as your recollection is concerned, it was about that time?

A. That is right.

Q. How many conferences did you participate in prior to the execution of the contract, after that time?

A. I believe the January 12th date was the day we served notice in writing on the Carrier, and I believe there were only two conferences,—perhaps the first conference ran more than one day, but I think there was only two conferences with the management before it was executed.

Q. Do you recall about when those two conferences occurred?

A. They were in March or April, or both possibly, in April, 1940.

Q. In those conferences was there any discussion about eliminating from the scope of the Telegraphers' agreements any operations in the Elmira Yard, or Yard office, or ticket office, or tower?

Mr. Davis: I object to that. The contract was reduced to writing, and the prior negotiations were merged in the written agreement.

Mr. Dwyer: Of course, we have here a contract which is offered for interpretation, and of course the intention of the parties is material.

Mr. Dwyer: Read the question.

Q. (Read by Reporter:) "In those conferences was there any discussion about eliminating from the scope of the [fol. 190] Telegraphers' agreements any operations in the

Elmira Yard, or Yard office, or ticket office, or tower?" (Continuing)—Eliminating from the scope of the agreement anything that theretofore had been included in the scope?

A. No; the scope was widened rather than taking something out of it.

Q. It was extended rather than lessened, is that correct?

A. Yes.

Q. Was there any discussion concerning the giving up or waiving by the Telegraphers of any right to any operation concerned in the claim revolving around the Elmira Yard office which had previously been discussed verbally and by correspondence?

A. No.

Q. Was there any discussion in those conferences concerning the confinement of the scope of the agreement to the positions listed in the Rate Schedule in the back of the agreement?

A. No, sir.

Q. The Rate Schedule in the back of the agreement, was that submitted to you prior to the printing of the agreement?

A. As a matter of form it always is, I believe; yes, sir.

Q. Was that submitted to you prior to the signing of the agreement?

A. Prior to, but after the conclusion of the conference.

Q. Did you discuss in detail the rate schedule?

A. No, it was never gone over and checked with the management.

Q. What is your understanding as to the effect of the Rate Schedule attached to the contract?

A. It has always been my understanding that the Wage and Position Schedules shown in the back of the Telegraphers' agreement is nothing more or less than information regarding the positions and the rate of pay they carry. I think you will find that very few agreements have a list of positions in the back of the schedule.

Q. I call your attention to the fact that the printed copy of the schedule contains the signatures of the parties, and is followed by the Rate Schedule. Have they understood the Rate Schedule to be a part of the contract except as it might be referred to in the contract?

A. I would consider it merely as addenda for information.

Q. Subsequent to the execution of the contract of 1940, you continued to be General Chairman for a time, did you not?

A. Yes.

Q. And did this Elmira situation continue to be discussed both within the organization and with the management?

A. Yes, sir.

Q. Do you recall on how many occasions you discussed or participated in discussions of that situation with the management after 1940?

A. I couldn't say how many conferences, but in every conference we had, the Elmira Yard office case was always uppermost in my mind for settlement as it should be settled.

Mr. Davis: That "as it should be settled," and that "it was uppermost in my mind," I move be stricken out.

The Court: Strike it out.

Q. Did I ask you what discussion was had with regard to the grade crossing elimination, in the conference of November 9, 1939?

A. Our Committee was told that would probably occur [fol. 192] within a very short time, probably within a few months, and that would take care of the situation. That was about six months ago when that happened, and that is still there.

Q. I show you a letter dated June 4, 1942, addressed to Mr. Lerbs, General Superintendent, signed by O. L. Chadwick. Did you write that letter?

A. I did.

Mr. Dwyer: I offer that letter as part of my case. That is Exhibit 11, which was introduced yesterday.

Mr. Davis: Is it offered only to show there was a protest?

Mr. Dwyer: Yes.

The Court: Received. That was Exhibit 11, received yesterday on plaintiff's case?

Mr. Dwyer: Yes.

Q. Prior to the time Exhibit 11, just shown to you, was written, did you also write a letter addressed to Mr. G. W. Murphy, Superintendent, dated April 27, 1941?

A. Yes, sir.

Mr. Dwyer: I offer that letter in evidence.

Mr. Davis: This is offered merely to show a protest?

Mr. Dwyer: Yes, for the same purpose as the previous correspondence.

The Court: Received.

(Letter from O. L. Chadwick to G. W. Murphy, dated April 27, 1941, received and marked: Defendant's Exhibit E.)

Q. And in reply you received Plaintiff's Exhibit 12, dated June 10th, did you not?

A. From Mr. Larbis; yes, sir.

[fol. 193] Q. And do you recall other instances in which similar complaint was made either verbally or in writing to the management, that is, similar to the complaints contained in your letter of June 4, 1942, Exhibit 11?

A. Bearing on this Elmira Yard office case?

Q. Yes.

A. I do not recall any other in particular.

Q. Was that the general tenor of your discussions all along concerning this proposition, that specific functions such as this which you claimed belonged to the Telegraphers were being performed by other than employees who were employed as Telegraphers?

A. That protest was continuing all the time.

Q. Since you have ceased to be General Chairman and have remained a member of the General Committee, have discussions on this Elmira Yard office situation continued right along down to date in pretty much the same way as they were carried on before?

A. Yes, sir.

Mr. Evans: Discussions with the management or with the Committee?

Mr. Dwyer: Both in the organization and with the management.

Mr. Evans: We object as to any discussion with the management.

Mr. Dwyer: I think the contention of the parties is in question here, and it is competent.

The Court: Overruled.

Mr. Evans: Exception.

Q. Was the proposition of what was and what was not in connection with the movement of trains the subject of

-[fol. 194] discussion between you and others participating in discussion, between you on the part of the Telegraphers and Mr. Moffatt and others on behalf of the management?

A. Yes.

Q. What was the position put forth by you on behalf of the Telegraphers as to what specific work is connected with the Telegraphers?

Mr. Davis: When?

Q. Was it the same all the time or did it vary?

A. Practically every occasion—every occasion, I will say, the communications of record matter was brought up.

Q. Can you tell us specifically what the terminology describing these matters is, the specific message is?

A. Communication of record, of course, is a record that is kept, a permanent record taken down by an employee on the sending end and the receiving end of communication.

Q. Has it been your experience that both ends of such communication should be handled by Telegraphers under the scope of your agreement?

A. Yes, sir.

Q. And what specific message, has it been the contention of your organization in these conferences, was to be so included?

A. Record of a crew being called at such a time, for example, out of Binghamton.

Q. You heard me ask Mr. Moffatt concerning a number of specific messages yesterday. Do you recall that?

A. Messages in all their different categories: such as train delays, car set out short of destination on account of hot box or otherwise crippled, reaches, consists of trains, [fol. 195] records of the train crews, such as engine numbers, and the names of the employees on those crews.

Q. What about your drill reports? Is that a delay for mechanical reasons?

A. I do not understand what a drill report is. I think that is within a yard or within a terminal. A delay report is a delay en route.

Q. And the "Consist" is the makeup of the train and the destination of each car?

A. That is right.

Q. And the "Reach" is the information concerning what time a designated train would reach the terminal receiving the message?

A. Yes, that is right.

Q. And a "Train Report" is the makeup of the crew and the engine?

A. Yes.

Q. There are then miscellaneous reports, are there, concerning which is it the contention of your organization, and has been all along through these proceedings, which affect the movement of these trains?

A. Yes; there are various reports that cover different situations that might arise at any time on a railroad, which are handled in the matter, which we contend are communications of record.

Q. And you say it consistently has been the management's contention that the only records concerning the movement of trains were train orders and clearance cards?

A. And O.S.-ing.

Q. What is that?

A. Reporting a train out or in at a station at any given point.

Mr. Dwyer: I think you may ask.

[fol. 196] Cross-examination.

By Mr. Davis:

Q. Mr. Chadwick, do you recall receiving from President Gardner a letter dated July 9, 1940, in connection with the 1940 agreement which you negotiated with Mr. Moffatt?

A. I do not recall any such letter.

Q. You do not recall receiving such a letter?

A. Possibly I did. I do not recall it at this time. I will say I knew I received a letter from Mr. Gardner but I do not know as to the date of it.

(Letter dated July 9, 1940, Mr. Gardner to Mr. Chadwick, marked: Plaintiff's Exhibit No. 17 for identification.)

Q. I show you Exhibit 17 for identification, and ask you if that is a copy of that letter you received from Mr. Gardner?

A. I have forgotten all about it.

Mr. Dwyer: I have the original letter (producing letter). I have no objection to its going in.

Mr. Davis (Examines letter produced): Just a minute; this is not the letter.

Mr. Dwyer: This is the date you referred to. May I see the copy?

The Witness: This is regarding the 1940 agreement.

Mr. Dwyer: Never mind what it is. Let me see the copy.

(Letter passed to Mr. Dwyer.)

Mr. Dwyer: No, I do not have a copy of that letter. What do you want to prove by it?

Mr. Davis: The last paragraph is all I am interested in, [fol. 197] in regard to the interpretation of the agreement by Mr. Chadwick.

Mr. Dwyer: This refers to a memorandum. I do not know what is in the memorandum. Where is it? If the memorandum is coming up next, I do not want it until I see what it is. I move to strike this out, which is a letter from Mr. Gardner to this witness, and I move to strike it out as irrelevant, immaterial, and incompetent.

Mr. Davis: Mr. Gardner, I think it shows, was the President of the Order of Railroad Telegraphers.

By Mr. Davis (Continuing):

Q. Was Mr. Gardner a President of the Order of Railroad Telegraphers?

A. He was.

Q. And still is?

A. Yes.

Mr. Dwyer: I have no such letter. But at the moment I think it is incompetent. I assumed he was offering a letter from Mr. Gardner to Mr. Chadwick, a copy of which I have here, but it is not the same thing.

The Witness: I can say absolutely I never received this letter from Mr. Gardner.

Q. I asked you if you received the original of which that is a copy?

A. I don't know whether that is a copy of the original. How would I know that is a copy?

Q. Wait just a moment. Will you let me ask the questions? [fol. 198] Mr. Dwyer: I am going to object to any further examination along this line. The Plaintiff served upon me

a notice to produce certain correspondence and documents, all of it being correspondence between the officers of the Order of Telegraphers and the various officers of the Plaintiff Corporation. This purported copy of a letter is something which I state to the Court is not in the letter file of the organization. I know nothing about it. It was not included within the notice, and I submit the Counsel for the Plaintiff is not now entitled to examine on the basis of a copy of a letter we know nothing at all about.

The Court: He can examine the witness to see whether he can prove it.

Mr. Dwyer: He says he does not know whether he received the letter or not. I submit he is bound by the answer. I do not know what it refers to. It refers to some memorandum which we know nothing about.

By Mr. Davis (Continuing):

Q. Where do you keep the correspondence you received from Mr. Gardner in July, 1940?

A. I had them in my files while I was General Chairman.

Q. Where are those files now?

A. They were turned over to my successor, Mr. Slocum.

Q. He has all those files?

A. Without doubt.

Q. Do you recall any correspondence in July, 1940, from [fol. 199] Mr. Gardner in regard to the negotiation and execution of the 1940 agreement?

A. I know I received a letter from him in connection with the 1940 agreement; yes, sir.

Q. Do you recall whether that letter was dated July 9th?

A. I do not.

Q. But you did receive such a letter?

A. Yes, I did.

Q. And you turned that letter over to Mr. Slocum?

A. I turned the files over to him. Whether that letter was in there, I couldn't say, but without a doubt it was.

Mr. Dwyer: Tell him where you got the letter?

A. (Continuing) I want to qualify the last answer by saying I don't know whether that is a copy of any such letter or not.

Q. Do you recall Mr. Gardner advising you in that letter that when you signed your agreement containing present

rates of pay, they became the negotiated rates as of that date?

Mr. Dwyer: No question about that, is there?

The Witness: I do not think so. I do not think any question would be raised about that.

Q. That is correct, is it not?

A. It must be.

Q. Do you remember him advising you: "If there is any office on your system where you are handling a matter of grievance which involves the rate of pay, the management should be served with a letter at the time of the signing of the agreement, specifying that in signing the agreement [fol. 200] ment you are not abandoning any part of the agreement"?

Mr. Dwyer: I object to this line of examination. It is putting into the record by indirection something that he cannot otherwise put in. As I previously stated, the Plaintiff served upon me a notice to produce. This document is not listed amongst the list of documents required. It is something I now state to the Court is not within the file of the organization. We know nothing about it, and I object to any further examination of this witness as to anything that is contained in what is contended to be a copy of the letter.

Mr. Davis: I will ask the Telegraphers' organization to produce the original letter now, the witness having testified it was delivered to Mr. Slocum and that Mr. Slocum has it in the file.

Mr. Dwyer: Here is the only letter in the file (producing letter), which was a letter from Mr. Gardner to Mr. Chadwick about that date. Do you want to use that?

The Court: Objection overruled.

Mr. Dwyer: Exception.

Mr. Dwyer: I further object to it as being a conclusion of not a person who is a party to the dispute and was not concerned in the negotiation.

The Court: Overruled.

Mr. Dwyer: Exception.

[fol. 201] By Mr. Davis (Continuing):

Q. Do you remember his advising you that "If there is any office on your system where you are handling with the management a grievance, the management should be served

with a letter at the time of the signing of the agreement, specifying that in signing the agreement you are not relinquishing the claim which is being prosecuted by the Committee?"

A. I do not recall the contents of Mr. Gardner's letter.

Q. Do you remember anything being said to you either by letter or verbally at about that time?

A. I do not recall any such.

Q. Do you remember Mr. Gardner writing you that "The signing of the agreement outlaws such claim or claims unless a letter such as I have mentioned is served upon the management"?

Mr. Dwyer: I object to that on the same grounds previously stated, and on the further ground it is a self-serving declaration.

The Court: Overruled.

Mr. Dwyer: Exception.

A. I do not recall the contents of the letter purporting to be from Mr. Gardner.

Mr. Dwyer: Now may I see the letter?

Mr. Davis: It is not in evidence.

Mr. Dwyer: You have examined from it. I ask the Court to direct Counsel to permit me to examine Exhibit 17 for identification. I am entitled to inspect it for that purpose.

The Court: Why not let him see it?

[Feb. 2021] Mr. Davis: I will put it in evidence (passing letter to Mr. Dwyer).

Mr. Dwyer: No; I do not want it in evidence. I do not see why you are making such a fuss about it.

Mr. Davis: I have read it once.

Mr. Evans: He wanted to give it to you.

Q. In any event, you did not serve the railroad with any such notice as Mr. Gardner specified in that letter?

Mr. Dwyer: Wait a moment. He is assuming something. We do not know that Mr. Gardner specified any such thing in the letter.

The Court: Sustained.

Q. Did you serve any notice in connection with the Elmira case at the time you executed Exhibit 10?

A. That notice, in connection with Exhibit 10, which is the 1940 agreement, was a reopening of the agreement.

Q. Yes, but you served no notice in connection with any position listed in the 1940 agreement—

A. The notice was merely to reopen the agreement, which could include any case.

Q. Did I understand you to say on your direct examination that the Rate Schedule at the end of Exhibit 10 was only addenda for information?

A. That is what I considered. It was after the signing of the parties thereto.

Q. When you negotiate, you negotiate not only the rules but also rates of pay?

A. The rates of pay are just carried over into the other [fol. 203] agreement. There might be some adjusting rates where there are inequalities in an office.

Q. That is a process of negotiation, isn't it?

A. For just that particular office, yes.

Q. But originally the rates were negotiated, weren't they, for all offices listed?

A. Do you mean from the start of the organization?

Q. Yes.

A. I don't know; I was not connected with the Committee at that time.

Q. You negotiated as to certain positions since 1940, did you not?

A. We negotiated all there is in that book, but we did not do it by individual negotiation as to each position.

Q. And in December of 1939, in connection with the settlement of this Elmira case, 12 positions were added to the agreement which were not formerly in the agreement?

A. I would not say they were not formerly in the agreement. They probably were at one time and were taken out arbitrarily by the Company.

Q. They were added by Mr. Moffatt's letter and your acceptance in December, 1939?

A. That is right.

Q. 12 employees?

A. That is right.

Q. And those positions were listed in Exhibit 10, which is the 1940 agreement?

A. Yes.

Q. I believe you testified on direct examination that you looked over the list of positions in the Schedule attached to Exhibit 10 before it was printed?

A. Without a doubt.

Q. And in that list was the position of Operator Towerman, with a 74 cent rate, in the Elmira Yard?

A. Yes, sir.

[fol. 204] Q. And there was no position in there of Operator at the Elmira Yard office, was there?

A. No.

Q. Do Conductors and Engineers and Firemen occasionally talk with the Dispatcher?

A. Unfortunately, they do.

Q. By telephone?

A. From outlying stations. That is under protest also.

Q. When did you make a protest on that?

A. It has always been protested,—reporting their location in and out.

Q. Did you ever agree with the management as to what constituted communications of record?

A. No. Rather the other way around,—the management has never communicated with me.

Q. In other words, there was a disagreement as to what constituted communications of record?

A. You might call it a jurisdictional dispute.

Q. Between you and the management?

A. That is right.

Q. Did you ever agree on a definition of what constitutes Operators' work, with the management?

A. I have in many conferences brought up that subject.

Q. But you never agreed, did you?

A. Never agreed.

Q. You never agreed what was Telegraphers' work, did you?

A. I agreed what I believed was Telegraphers' work.

Q. You agreed with yourself, but never agreed with Mr. Moffatt or Mr. Shoemaker?

A. I agreed with them but not on that particular subject.

Q. Do you contend that the Scope Rule of Exhibit 10 [fol. 205] sets forth in detail what duties must be performed by employees known as Telegraphers?

A. It does not set forth the duties at all. It defines the different classes of service to which we are entitled to representation.

Q. It names the positions?

A. It does not define duties. It lists the different names of positions in our craft.

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Q. It just says "Agents, as shown in the Rate Schedule"?

A. It does not define the duties. No agreement does that I have ever seen.

Q. During your tenure of General Chairman at the time you made this agreement with Mr. Moffatt in December of 1939, you increased the number of positions on the railroad which were held by members of the Telegraphers' organization, didn't you?

A. I believe there were some increases that were granted.

Q. In other words, you had more positions than you formerly had?

A. You mean the number of positions?

Q. Yes.

A. It shows that 12 were included, yes.

Mr. Davis: That is all.

Re-direct examination.

By Mr. Dwyer:

Q. Now, Mr. Chadwick, while you were General Chairman of the D.L. & W. Division of the Telegraphers' organization, you kept a letter file of all correspondence, did you?

A. Yes, sir.

Q. In that file did you place all correspondence received by and sent by you concerning organization business?

A. I did.

[fol. 206] Q. Did you keep it carefully?

A. Very carefully.

Q. Have you had occasion to review that file recently?

A. I do not have that file now.

Q. Well, from what review of the file we have had here in court, from the production of exhibits and so on, would you be able to tell us whether or not the file of letters with which you were connected was fully kept?

A. I would say the file contained all letters received, and copies of those sent out.

Q. I show you a letter dated December 7, 1939, to O. L. Chadwick from V. L. Gardner.

A. That is not a copy of a letter; that is the original.

Q. Did you know that was in the file?

A. Yes, sir, absolutely.

Q. Do you recall receiving any other letter from Mr. Gardner at or about that time?

A. I do not, not on that subject.

Q. Do you recall when this agreement, Exhibit 7, was signed?

A. The agreement bears an effective date of May 1, 1940, isn't that right?

Q. Yes.

A. But it was not formally signed in Scranton in the Superintendent's office by Mr. Moffatt and myself until the 5th of July, in the forenoon, by Mr. Moffatt and I.

Q. So if you received a letter dated July 5, 1940, it would not have anything to do with the agreement anyway, would it?

A. No.

Q. I call your attention to Exhibit 10, to a reference to "Telegraph Operators except Switchboard Operators." There are Switchboard Operators on the road, are there?

A. Yes, sir.

[fol. 207] Q. You make no claim to representing them?

A. No, sir.

Q. And never have?

A. No.

Q. I call your attention to "Agents, as shown in the Rate Schedule". There are Agents on the road other than those included in the Rate Schedule, are there not?

A. Yes.

Q. And that exception was discussed when the contracts were drawn, is that right?

A. It was understood by all parties, yes.

Q. Did you attempt to secure the representation of other Agents?

A. Yes.

Q. And you were limited to those in the Rate Schedule?

A. Yes.

Q. Did you negotiate for, or understand you were negotiating for, any other class of service on the road except those in the Rate Schedule?

A. No. We never tried to represent other than those that belonged to us.

Q. And all persons within the Scope Rule were the persons for whom you bargained in this contract?

A. Yes.

Q. And not limited by the Rate Schedule?

A. No.

Mr. Davis: I ask the answer be stricken out.

The Court: Overruled.

Mr. Davis: Exception.

Recross-examination.

By Mr. Davis:

Q. I would like to refresh your understanding. I show you a document dated July 13, 1940, a copy of a document purported to be addressed by you to Brothers Boelcher, [fol. 208] Kelly and West, and ask you if that refreshes your recollection in connection with Mr. Gardner's letter of July 9th?

A. I would say from this letter, which apparently—

Mr. Dwyer: Do not tell what it is. Do you remember it or don't you?

Mr. Davis: Just keep quiet, Mr. Dwyer. We are getting along fine.

Mr. Dwyer: I am going to have something to say about it.

The Witness: So am I. This is—

Q. Do you remember writing a letter like that?

A. I can't go back six years and tell you everything that happened.

Q. Have you a copy of the letter which was sent to these gentlemen?

A. No. I turned all my letters over to Mr. Slocum.

Q. Was a copy of this letter in your file?

A. I don't know. How could I answer that?

Q. I thought you had a good recollection?

A. Not that good.

Q. You remember a number of conversations you had with Mr. Moffatt in 1939?

A. Yes.

Q. But you can't remember a letter of 1940?

A. Those were vivid conversations.

Q. But you can't remember this?

A. I don't know that any such letter was ever written. It may be correct and may not be correct.

Mr. Davis: That is all.

Cross-examination.

By Mr. McEwen:

Q. Mr. Chadwick, in your testimony I understood you to say, referring to certain conferences with Management that [fol. 209] you conducted in 1939, that, you then made a claim with Management that the Crew Clerk jobs at the Elmira jobs should be performed by Telegraphers. Did I understand you correctly?

A. No. If I did, I put myself a little off on that. What I meant was that a good share of the duties being performed by the Crew Clerks at the Elmira Yard office were the same duties formerly performed by our men when they were on those positions, and were undoubtedly work that belonged to us.

Mr. Davis: I ask the last part, from "undoubtedly" on, be stricken out.

The Court: Strike it out.

Q. Have you ever made any claim, or did you ever make any claim at the time you were General Chairman, for work other than communications work being performed by those Crew Clerks?

A. Do I understand your question is: did I ever make any claim for other duties than those enumerated this morning in the testimony?

Q. Was it your claim that any communications work performed by the Crew Clerks should be performed by the Telegraphers?

A. Yes, sir.

Q. Did your claim include any work other than communications work?

A. No. The work the Crew Callers were doing was record work we claim belonged to us.

Mr. McEwen: That is all.

Recross-examination.

By Mr. Davis:

Q. That included all the writing down, — you claim that?

A. I claim communications of record.

[fol. 210] Q. You claim writing down?

A. I claim anything that is made a permanent record on either end of the line or on one end of the line.

Q. In other words, that is Telegraphers' work?

A. Writing any communication of record is Telegraphers' work.

Mr. Davis: That is all.

Redirect examination.

By Mr. Dwyer:

Q. In short, anything that is communicated by wire or telephone, and is recorded at either or both ends of the line for future information, concerning the operation of the trains on the road, are things which the Telegraphers claim are things that come within the Scope Rule of the Telegraphers' union?

A. That is right.

Q. They do not claim the functions of the Crew Callers?

A. No.

Mr. Davis: That is all.

(Recess, 12:10 P. M. to 1:30 P. M.)

Supreme Court Chambers, Elmira, N. Y.

Afternoon Session commencing at 2:00 o'clock.

ORVILLE L. CHADWICK, re-called to the witness stand, testified as follows:

Recross examination.

By Mr. Davis (Continuing):

Q. Mr. Chadwick, at the time you handled the claim involved in the Elmira Yard case with Mr. Moffatt, did you have a written claim from any individual employee?

A. No, sir.

[fol. 211] Did you have a written authorization from any individual employee authorizing you or requesting you to handle a claim for him with Mr. Moffatt in connection with this Elmira Yard case?

A. No, sir.

various parts of the train, and the services required by the train in Elmira Yard?

Mr. Davis: I object to that, because the witness just testified the information he has described was information transmitted to the Yard force in Elmira so they could do their work, and not what Mr. Dwyer has tried to interpret. I do not mind the witness testifying but I do not like to have Mr. Dwyer testify and say something the witness did not say.

The Court: Sustained.

Q. We will do it the long way then. What other information was on this report, if you can think of any?

A. The information which I have already stated: ice reports, and—

Q. Anything further?

A. Not generally speaking. Occasionally there might be some other matter, such as "No Bill" on a car, or some other thing, but generally speaking ice reports, consists, reports of heaters, and reports of live hogs for drenching purposes, and so on.

Q. And that is the consist, generally speaking, is that right?

A. That is right.

Q. What other message was regularly handled as a matter of routine between your office and Elmira prior to 1938?

A. Any message that might be filed by anybody going to anybody in Elmira.

Mr. Davis: I ask that be stricken out. He does not know what happens to the messages in Elmira. He is in Buffalo. [fol. 216] The Court: Sustained.

Mr. Davis: I ask the answer be stricken out.

The Court: Strike it out.

Q. In the course of your 35 years, or whatever it might be, on the road, you have become familiar with the general practices and routine operations on that road, have you not?

A. I believe so.

Q. You have sent messages east and received messages west?

A. That is right.

Q. And you are familiar with the instructions from your operating superiors, your operating rules, concerning the handling of these messages, are you not?

Q. Did I understand your testimony this morning to be that both ends of a communication which was put down in writing by the receiver must be handled by an Operator?

A. I consider that anything that is handled from one point to another over telegraph or telephone and is a permanent record or is a communication, that is, therefore, a communication of record, belongs to the Telegraphers.

Q. And must be sent by an Operator and received by an Operator?

A. It belongs to our class of service and should be handled that way.

Q. Then you are claiming Dispatcher's work, is that correct?

A. No.

Q. Doesn't a Dispatcher receive a communication from an Operator that is put down and reduced to writing?

A. That is covered by a separate agreement, and we do not represent the Dispatcher on this particular road.

Q. But the Dispatcher receives a message from an Operator that is put in writing, isn't that correct?

A. Yes, and I will say Dispatchers are doing work that belongs to us.

Q. You claim Dispatcher's work then?

A. No, but I claim they are doing work that belongs to us at the present time.

Mr. Davis: That is all.

Witness excused.

[fol. 212] RAYMOND D. WEST, duly sworn as a witness on behalf of the Defendant Slocum, testified as follows:

Direct examination.

By Mr. Dwyer:

Q. Where do you live, Mr. West?

A. 14 West Cleveland Drive, Buffalo, N. Y.

Q. Where are you employed?

A. D. L. & W. Railroad, at East Buffalo Yard.

Q. What is your occupation?

A. Telegrapher.

Q. How long have you been employed by the D. L. & W. Railroad?

A. About 34 or 35 years.

Q. What positions have you held?

A. First I started in as an extra man on the Scranton Division for about four years.

Q. As what?

A. Telegrapher, Operator, Operator Clerk, or in that class of service. Then I went to the Buffalo Division in 1913 and worked extra from March 27 to May 30th, 1913. I went to the East Buffalo Yard on May 31st and am still there.

Q. And all the time you have been employed as a Telegrapher, that is, as Operator or Operator Clerk?

A. That is right.

Q. How much of that time have you spent in communication with Operators or Crew Clerks in the Elmira Yard office?

A. On an average of twice within an hour period, or twice every day, for 5, 10, 15 or 20 minutes, whatever the time required to do the work that was to be done.

Q. Over this entire period of time?

A. That is right.

[fol. 213] Q. Are you familiar with the type of work handled with the Elmira Yard Operators from your office prior to 1938?

A. Yes, sir.

Q. We are talking now of communications?

A. Right.

Q. What type of communications were regularly handled in the course of business every day with the Yard Office Operators in Elmira by your office prior to 1938?

A. We gave Elmira Yard—

Q. These are the Operators?

A. The Operators. Prior to 1938?

Q. Yes.

A. The Telegraph Operators in Elmira Yard. We gave a list of all the freight trains eastbound going to Elmira Yard. That list consisted of a symbol number, engine number, Conductor's and Engineer's name, time they left East Buffalo, and the total loads, and empties, and tonnage in each train. In addition to that the Yard Towerman furnished a consist to the Yardmaster at Elmira. This particular consist was broke up into set-off points, such as a given number of cars to be set off at Elmira, another given number at Binghamton, another given number at Scranton, perhaps another given number at Port Morris.

Q. Let me inquire there. That consist was transmitted from an Operator in Buffalo to an Operator in Elmira, was it?

A. That is right.

Q. Was that consist recorded prior to its sending in permanent record form in Buffalo?

A. Generally speaking, the consist was made up by a Clerk in East Buffalo off from what is known as a T-16. That is a form filled out by help down in the Yard where a car is switched into a train.

[fol. 214] Q. Now then, do you know as a matter of practice on the road whether or not a consist was recorded where received?

A. The consist must have been recorded.

Mr. Davis: I object to that.

The Court: Sustained.

Q. You had a consist coming the other way, did you not?

A. Yes.

Q. What was the practice in relation to consists?

A. All we received was made a matter of record.

Q. And that was pursuant to instructions from your operating superior?

A. That is right.

Q. Go on and tell us what others were handled?

A. There were ice reports, cars to be iced in Elmira, the initial number of the car, where it stood in the train, reports of cars containing heaters in cold weather, where they stood in the train.

Q. They were considered miscellaneous reports, were they,—or messages, rather?

A. They were connected with the consists, or rehandled at the same time with the consists, or additional information on the consist, other than just the cut in cars or where the cars were going. Also reports of carloads of live hogs which might want to be drenched at Elmira in hot weather.

Mr. Evans: Is that part of the consist information?

Q. Is that part of the consist information?

A. That is right. This consist consists of whatever information that they deem necessary for the Yard force in Elmira to know.

[fol. 215] Q. In other words, it consists of information relative to the makeup of the train, the destination of the

A. Yes, sir.

Q. Elmira is a part of the Buffalo Division, is it not?

A. There has been a change since 1938 in the division point, but Elmira was prior to 1938 what we knew as a division point, the end of the Buffalo Division at that time.

Q. So that the same Superintendent had jurisdiction over the Elmira Yard and Yard office as had jurisdiction over the Buffalo Yard and Yard office?

A. That is right.

Q. Did you from time to time in the course of this period, prior to 1938, transmit general instructions to the Elmira Yard office that were issued by your Superintendent?

A. Not so much by the Superintendent, because the Superintendent's office was in a different place, but by the Yard Department or the Agent's office.

Q. You have come in contact with and discussed the operation of the Elmira Yard office with the employees in [fol. 217] the Elmira Yard office, both by telephone and personally, have you not?

A. Yes, sir.

Q. Over a long period of time?

A. Yes.

Q. Incidentally, you are the Local Chairman of the Buffalo Division of the D. L. & W. in the Telegraphers' organization, are you not?

A. Yes, sir.

Q. And have been for how long?

A. Since 1921, with the exception of a few months several years ago.

Q. You are familiar, by reason of your experience and association and what not, with the routine which requires the recording of certain messages and the compilation of certain reports, are you not?

A. I believe so.

Q. And do you know, as a matter of practice, that the consist containing all this information you have related is recorded by the person receiving it? For instance, at the Elmira Yard office that is the common practice,— wasn't it?

A. It must have been information they wanted or there would have been no use of transmitting it.

Mr. Davis: I move to strike it out.

The Court: Strike it out.

Q. That is the common practice on the road, isn't it, to record these at the point of reception?

A. That is right.

Q. And was prior to 1938?

A. Yes.

Q. And still is today?

A. Yes.

Q. What other reports are handled in the course of everyday business, or were prior to 1938, by the Operator in Elmira with the Operator in East Buffalo?

[fol. 218] A. The Operator in Elmira would give East Buffalo the same lineup on westbound trains which we gave him on eastbound trains.

Q. That is, the consists, as you have just related?

A. The Engineer, Conductor, engine, time, cars, loads, empties, different classifications manifested: coal, empties. They also gave a car for car consist on what we knew as symbol trains or fast freight trains. That consist showed the initial, and the number, the route, that is, the road it might travel if it was going west of Buffalo, destination of each car in the train as they stood from the engine to the caboose.

Q. And that was recorded where received?

A. Yes, sir.

Q. Then there is what is known as the "Train Report," is there?

A. This is known as the "Train Report." When I say I gave Elmira the trains east, and he gave me the trains west, it is just a matter of record of the Yard Department of the number of different trains that are coming, and what they have, because consists were not given car for car on all trains. There were trains with just the total number of the different commodities manifested: freight, coal, empties were given, and not a detailed car for car consist.

Q. Then there are other reports that are routinely handled, are there not, that have nothing to do with the makeup of a train? For instance, you heard me discussing with Mr. Moffatt yesterday certain specific messages or reports?

A. I don't know just how to go to work to answer that question.

[fol. 219] Q. Perhaps I can help you. What is a "Reach"?

A. A "Reach" is given by the Train Dispatcher to a given point of the probable time that train will arrive at that

point, where another crew has got to be called, or where they want advance notice for some reason.

Q. You have received such reports, have you?

A. I have not. They did receive them in Elmira.

Q. You do not get them going west?

A. In my case, the train starts from where I was located. That is where the train is made up. If the train goes east, Elmira received a Reach to prepare a crew for the probable time that train would arrive in Elmira, to take it on east. Also the same thing from a westbound standpoint: they received a Reach from the Dispatcher on the probable arrivals of westbound trains, to bring the train on through west to Buffalo.

Q. Do you know, as a matter of practice, whether or not the Reach is recorded when received?

A. I would say the Reach is recorded.

Mr. Davis: I ask the answer be stricken out.

Mr. Evans: Unless the witness knows, motion granted.

Q. Do you know, as a matter of practice, that that has occurred and still does occur?

A. Somebody must be told by the Operator in Elmira that—

Mr. Davis: I object and move the answer be stricken out.

Mr. Evans: We can do that reasoning as well as he.

Mr. Dwyer: I hope so.

[fol 220] Q. Do you know, as a matter of fact, what occurred after the Reach—we are still talking about prior to 1938, what occurred after the Reach was received, we will say in Elmira? As a matter of practice, what was done with it?

A. The Reach was given to the Operator. The Operator in turn had to give it to someone.

Q. To the Crew Caller?

A. Men we termed Crew Callers or Crew Clerk's—as to what time that train was going to reach there, and he in turn made arrangements for his crews.

Q. And then about train delays, delays en route and delays in the terminal, did you handle those reports with the Operators in Elmira prior to 1938?

A. I didn't.

Q. Were they handled in your office?

A. No.

Q. Where were they handled?

A. Delays of westbound trains would not be left at my office. All those delays are addressed to the Superintendent. They go to the Superintendent's office, which has been in Buffalo, and is yet in Buffalo.

Q. You did not handle them with Elmira?

A. I did not handle them with Elmira. Elmira handled his delay reports with Buffalo but not with East Buffalo.

Q. How were they handled?

Mr. Davis: He doesn't know. He was at East Buffalo.

A. They were handled by telegraph prior to 1938.

Q. They were transmitted over the telegraph prior to 1938?

A. Yes.

Mr. Evans: What reports?

[fol. 221] Q. Both terminal and en route?

A. That is right.

Q. Suppose a car started from Elmira and was to be rerouted after it left, what was it known as then?

A. What we know as a message diverting a car would be sent from the Superintendent, or possibly from the Agent at East Buffalo, if he had the necessary authority, to divert a car, to someone in Elmira, probably the Agent in Elmira or the General Yardmaster, to divert the car. That would be what we call a message.

Q. Who transmitted and received the message?

A. The Operators at both ends.

Q. Were those messages commonly transmitted and recorded as a matter of record?

A. I would say yes, as a matter of record.

Q. Without my going through the entire line, what other routine messages were carried on between the Operators in East Buffalo and the Operators in Elmira?

A. That was perhaps the big share of the work carried on between East Buffalo and Elmira.

Q. Had you also worked in the station at Buffalo?

A. No, never.

Q. You never worked there?

A. No.

Q. I assume when you first went to work on the road, all communications of the nature you have described were transmitted by telegraph, is that right?

Mr. Davis: I object to it as leading.

Mr. Dwyer: I will spend 20 minutes getting it then.

The Court: Overruled.

[fol. 222] Q. Is that correct, the ones you have described to us?

A. The telephone came on to the Railroad for Train Dispatcher's use about the same time I came on to the Railroad, but first off it was used, generally speaking, for Dispatchers and Dispatchers only. All other work was generally done over the Morse wire. As time went on more work has reverted to the telephone and less to the telegraph.

Q. When the telegraph was the principal means of communication when you first went on the road, Mr. West, were the Telegraphers the only people aside from the Dispatcher who handled communications, anything on the Railroad other than message work?

Mr. Evans: Of course, you are excluding mail too?

Mr. Dwyer: Yes; we are not talking about mail.

A. Generally speaking, most of the work, or practically all of the communication work, was done by telegraph.

Q. Then, as you have indicated, the use of the telephone gradually became more widespread, is that right?

A. That is right.

Q. Has it come to the point where you might say the bulk of communications on the road now, that is, operating communications, are now transmitted by telephone?

A. That is right.

Q. Amongst railroad people, Mr. West, do you know whether or not the transmission of messages by either telegraph or telephone have universally been regarded as synonymous operations?

[fol. 223] Mr. Davis: I object to that as suggesting the answer and leading, it is incompetent, and is calling for a conclusion.

The Court: Objection sustained.

Mr. Dwyer: Exception.

Q. Now then, you have continued to work with the Elmira Yard office since May, 1938, have you, Mr. West?

A. That is right.

Q. Since May, 1938, with whom do you communicate in the Elmira Yard office?

A. The Crew Clerks.

Q. Do you come to know people along the line by their voice and what not?

A. Yes, sir.

Q. Can you tell us, Mr. West, what communications you generally handle as a matter of ordinary routine with the Crew Clerks in the Elmira Yard now?

A. The same ones I described handling with the Operator's prior.

Q. All of them?

A. Yes.

Q. Has that situation been true since May 1, 1938?

A. Yes, sir.

Q. How long have you been Local Chairman, Mr. West?

A. Approximately 24 years.

Q. And as Local Chairman during that 24 years, you have been a member of the General Committee of the Telegraphers' organization, have you not?

A. Yes.

Q. Have you participated in the negotiation of contracts?

A. Yes, sir.

Q. Have you participated in the adjustment of disputes?

A. Yes, sir.

Q. And has your activity along that line been rather wide, or has it been infrequent?

[fol. 224] A. Well, sometimes it has been rather wide, and sometimes not so frequent?

Q. As the occasion demanded?

A. That is right.

Q. But during that time have you become familiar with the manner of the dealing of your organization with the D. L. & W.?

A. I believe so.

Q. When did you first know about the proposed change at the Elmira Yard office, Mr. West?

A. The day it happened.

Q. You as a member of the General Committee had not been consulted by anybody, or advised by anybody, that it would occur?

A. No, sir.

Q. Did you from May, 1938, on complain to Management concerning the handling of communications by the Elmira Yard office?

Mr. Davis: I object to that. The record shows the first complaint was made on August 1, 1939.

Mr. Dwyer: Mr. Davis, we are not bound by your records. You know that.

Mr. Evans: Let him fix the time.

The Court: Overruled.

Mr. Davis: Exception.

Q. (Read by Reporter:) Did you from May, 1938, on complain to Management concerning the handling of communications by the Elmira Yard office?

Mr. Davis: That is objected to on the further ground it is too general.

Mr. Dwyer: It calls for a yes or no answer. We are not going into details.

[Col. 225] The Court: Overruled.

Mr. Davis: Exception.

A. Yes.

Q. You did?

A. Yes.

Q. Do you recall when the first complaint was made, and to whom it was made by you?

A. I believe it was made to Superintendent Alexander, Superintendent of the Buffalo Division.

Q. And about when.

A. I can't tell you the date.

Q. Was the first complaint made by mail or orally, do you recall?

A. I do not recall, but I will say by mail. We may have discussed it before I wrote a letter. I can't tell you that now.

Q. Is the letter marked Exhibit 15, which I now show you, the first letter you wrote Mr. Alexander?

A. I think so.

Q. And the reply attached, marked Exhibit 7, is the reply you received?

A. Yes.

Q. Did Plaintiff's Exhibit 4 ever come to your attention?

A. Do you mean, did this particular letter come to my attention?

Q. Yes?

A. No.

Q. Either at or about the time it is dated, April 30, 1938, or later? You had not seen it prior to the time you got in here, is that right?

A. No, I had not seen it until we got here. That is right.

Q. Then from August 1, 1939, on down to date, have you continued to discuss the Elmira Yard matter with representatives of the Management?

A. The question has been brought up on several occasions, also brought up in the General Committee on several [fol. 226] occasions in a variable form, and was discussed.

Q. That is, the Committee has discussed the situation among themselves?

A. That is right.

Q. And has the Committee, on various occasions, as a whole, discussed the matter of men?

A. I believe so.

Q. Do you recall any specific discussion of the matter which you participated in between the Management and your organization?

A. I would not try to recall any specific time.

Q. Do you recall the conference of November 9, 1939? Were you present at that conference?

A. (No response.)

Q. I show you Exhibit C and Exhibit 8. I call your attention on Exhibit C to the lower part of the first page, "Cases 6 and 7, East Buffalo and Elmira Operators. We will accept this proposition, with the understanding that as future developments warrant we are privileged to reopen these cases, and desire that all regular message service be performed by Operators," and in response to that letter, Item 7, in Exhibit 8, reading "Elmira Yard Operators' present arrangement will be continued until such time as grade crossing project is completed, when present Tower Operators will be transferred to the Yard office." Do you now recall that conference?

A. Yes, sir.

Q. Can you tell us, in substance, what occurred at that conference and what you discussed in relation to the Elmira Yard office?

A. No, I can't tell you what all took place at that conference. The general trend of the discussion, as far as Elmira Yard was concerned, probably was that we were maintaining that there was work there belonging to us and that we weren't getting it.

Q. Performed by whom?

A. Performed by Crew Clerks. And that we were not satisfied with that setup. Mr. Moffatt probably mentioned the fact that —

Q. When you say "probably" you are giving us your recollection, is that right?

A. That is right. He probably mentioned the fact they expected to eliminate a crossing there, and that when that was done we ought to be able to straighten ourselves out on it by putting Operators back into the Yard office.

Q. Do you recall whether it was contemplated that the three Operators in the Tower would be put in that office, and the Tower Operators would be abolished? Is that it?

A. The positions, not necessarily the individuals holding the positions.

Q. That is right?

A. Yes.

Q. Do you recall whether or not any time within which this grade-crossing elimination was to occur was mentioned?

A. I do not think any specific time was mentioned, but the thought was that it would be in the near future.

Q. And then did you later during 1939 have any further discussion with anybody representing Management concerning the Elmira situation, that you recall?

A. I do not recall now, because we have discussed it so many times in the General Committee, whether it was before [fol. 228] someone representing the Management,—it wasn't on each occasion it was discussed, but it may have been on some occasions.

Q. Then do you recall the reopening of the negotiations on contract in 1940?

A. Yes.

Q. Did you attend discussions, as a member of the General Committee, with the Management on that?

A. Yes.

Q. Was the full Committee there?

A. First off I think I should say that we attended meetings of our own in the General Committee prior to meeting Mr. Moffatt, and also attended both our own and the meeting with the General Superintendent.

Q. How many times do you recall having met with the General Superintendent?

A. I have met with him a good many times, but probably in this connection a couple of times, or something like that.

Q. In this conference was the proposed new agreement discussed at quite some length?

A. Each rule that entered into the agreement was discussed, and a mutual agreement finally reached, before the rule became one of the rules of the agreement.

Q. Was there any discussion concerning the elimination from the Scope Rule of the operations in the Elmira Yard office previously performed by persons classified as Telegraphers?

A. No.

Q. Was there any discussion of that nature had by the General Committee at any time?

A. No.

Q. Was there any discussion in the course of those negotiations concerning the waiver of the right of the organization to represent the persons in the Elmira Yard office who were performing Telegraphers' work?

A. No.

Mr. Davis: I object to that "who were performing Telegraphers' work."

The Court: Objection overruled.

Mr. Davis: Exception.

Q. Do you know whether or not, Mr. West, that the contention of the General Committee, throughout these discussions of 1940 on the contract and previous to that time, was that there was work being performed in the Elmira Yard office which properly was covered by your agreement?

A. I think everybody agreed to that on the General Committee.

Q. Was that discussed by the Committee with the Management?

A. Yes, I think it has been, on several occasions.

Q. In negotiating this agreement what was your understanding, at the time the negotiations were on and since then, of the addenda from page 13 on of the contract, headed "Rates of Pay, M. & E. Division."

A. Each man in our class of service gets a copy of that book, and that is information in which each man can see what each job pays.

Q. Is it your understanding, Mr. West, that the Telegraphers are restricted in the representation of people performing Telegraphers' services on the road, —are limited to those specific positions set out in that Rate Schedule?

A. No, sir.

Q. Was that ever discussed by anybody or urged, by anybody in the Committee, either in conference in the Com- [fol. 230] mittee or in conference with Management?

A. No, sir; there was never no question about that to my knowledge.

Q. What is your understanding of the Scope Rule involved in the contract?

A. It covers certain employees who do work in our class of service, the communication class of service, such as Agents, Operators, Towermen, Train Directors, Telegraph and Telephone Operators except Switchboard Operators.

Q. Anyone performing those services?

A. That is right.

Q. Subsequent to these conferences of 1940 concerning the negotiation of a new agreement, have you as a member of the General Committee participated in further discussions of the Elmira Yard office situation?

A. Since 1940?

Q. Yes.

A. Yes, I believe I have.

Q. As a member of the Committee in Committee meetings?

A. Yes.

Q. Have you discussed it as a member of the Committee since then with the Management?

A. I don't know whether the matter has been discussed by the General Committee in oral discussions since 1940 or not.

Q. You do know, do you not, that there has been correspondence?

A. There has been correspondence about it.

Q. Has the General Committee at any time acceded to the Management's position that the communications work now being handled by Crew Clerks in the Elmira Yard office is not covered by your agreement with the Road?

A. No; the General Committee has not conceded that.

[fol. 231] Q. Has the General Committee at any time waived their right to represent those persons in the Elmira Yard office handling communications work?

Mr. Davis: I object to that on the ground it is calling for the conclusion of the witness.

The Court: Objection sustained.

Mr. Dwyer: Exception.

Q. You have participated in the meetings of the General Committee, have you?

A. Yes, sir.

Q. Consistently down through the years?

A. Yes, sir.

Q. And you have participated in discussion of the affairs of business as handled by the Committee?

A. Yes.

Q. Participated in the deliberations of the Committee?

A. Yes, sir.

Q. And acted on propositions before the Committee for action?

A. Yes, sir.

Q. Can you tell us whether or not at any time since 1938 the General Committee has taken any action the effect or substance of which is a waiver of the right to represent the employees in the Elmira Yard office in communications work?

Mr. Davis: I object on the ground it is calling for a conclusion of the witness, and upon the ground it is incompetent and is not binding on the plaintiff in this case. What discussions they had amongst themselves, we have no knowledge of that.

The Court: Objection sustained.

Mr. Dwyer: Exception.

Mr. Dwyer: You may ask.

[fol. 232] Cross-examination.

By Mr. Davis:

Q. Mr. West, at the time you sent this letter, to Mr. Alexander, dated August 1, 1939, had any Telegrapher made any protest to you in connection with the work which the Crew Clerks were doing at Elmira Yard?

A. No protest perhaps in the way you mean it. You hear protests from different people as a thing generally not being right, but they do not put themselves on record as making a protest.

Q. But no individual had made any claim?

A. No.

Q. And I believe you said you talked with these Crew Clerks every day for a few minutes?

A. That is right.

Q. And you commenced doing that on May 1, 1938, didn't you?

A. That is right.

Q. The first time you made any written protest in connection with the information they were giving to you was on August 1, 1939?

A. I think that is right.

Q. And did anybody make any protest about the work which you were doing with the Crew Clerks?

A. No.

Q. In December of 1939 you met with Mr. Moffatt as a member of the General Committee and discussed the 18 cases which are listed in Plaintiff's Exhibit 8?

A. Yes, sir.

Q. And you went over the answers which he gave you to each of those claims?

A. Yes, sir.

Q. And then you advised Mr. Chadwick you would agree with him in accepting the answers which Mr. Moffatt gave you?

A. Did I make any exceptions in the agreement?

[fol. 233] Q. Did you see that letter that Mr. Chadwick wrote to Mr. Moffatt, Plaintiff's Exhibit 9?

A. In my letter to Mr. Chadwick I think I did make some exceptions.

Q. Did you take any exception to the Elmira Yard Case, No. 7?

A. Yes.

Q. Have you got that letter with you, Mr. West?

A. The exception was taken here in a letter that—

Q. Have you got the letter?

A. The letter deals with perhaps several cases or several things here. The paragraph in this letter—

Mr. Dwyer: You haven't got to let those fellows read your file if you don't want them to!

Q. When was the letter dated, Mr. West?

Mr. Dwyer: Mr. Davis, why don't you let him find it, instead of reading his file? There might be something in there that is none of your business. Please step away.

Mr. Davis: I thought maybe I could help him find the letter.

Mr. Dwyer: He reads very well.

Mr. Davis: Does he? Is there anything in there you don't want me to see?

Mr. Dwyer: I don't know what is in there, but it is personal to him.

A. In a letter dated November 21, 1939.

Q. That was prior to the receipt of this letter from Mr. Moffatt of December 2, 1943, wasn't it?

A. Yes.

Q. That was before this?

A. Yes, that is right.

[fol. 234] Q. Now, Mr. West, I believe you testified on your direct examination that all the work you formerly handled with the Operators, you subsequently handled with Crew Clerks?

A. Well, all the work that was left that the Crew Clerks could do. The Crew Clerks could not do all the work the Operators did, such as telegraphing.

Q. Then you did handle message work with the Telegraphers down at the ticket office, didn't you?

A. We have handled message work with the Telegraphers at the ticket office, yes.

Q. All message work was transferred to the ticket office, wasn't it?

A. It was supposed to be at the time the change was made.

Q. All message work you have handled was handled with the Operators at the ticket office, is that right?

A. All I have handled was handled that way; that is true.

Q. I believe you testified you used to get a detailed consist, car by car, from the Operators at Elmira prior to 1938?

A. That is right.

Q. Since 1938 where have you gotten that detailed consist?

A. That was discontinued in Elmira, and the Conductor furnishes it at Bath or Cohocton.

Q. And you get it from an Operator, don't you?

A. I get it from an Operator on my trick. They did not always go to an Operator, but I got it from an Operator on my shift.

Q. Elmira has been discontinued as an icing station, hasn't it?

A. I believe so, yes.

Q. You know it has?

A. I have been told it has.

[fol. 235] Q. So the cars have not been iced here any more?

A. No. But they were for a long time after 1938.

Q. And the diversion messages are now handled through the Operators at the ticket office, aren't they?

A. If I get them, yes.

Q. At the time this change was made, in 1938, did you know about the increase of rate of the Operator Towermen from 71 to 74 cents?

A. Yes, sir.

Q. You knew all about that?

A. Yes, sir.

Mr. Davis: That is all.

Re-direct examination.

By Mr. Dwyer:

Q. About the Operator Towermen: prior to May 1, 1938, were the Operator Towermen "Towermen" only.

A. Towermen.

Q. Did they handle communications work at all?

A. No.

Q. Were they Operators?

A. One of them was a Morse man, because he had worked in that line of business before he went into the tower.

Q. The other two were not?

A. One of them wasn't a Morse man, and there was a question about the other one; he was what we sometimes term as "Ham Operators," I would say.

Q. Send on a tin can?

A. (No response.)

Q. Were those two employees moved out of the tower by reason of the transfer of the communications work, whatever it might be, to the tower?

A. Out of the six men involved in the two offices; the Yard office and the tower, three of course were moved out. One of them was a Yard office man, and two of them were from the tower, I believe, as I remember it.

[fol. 236] Q. Now, assuming that the Towermen, after the change in 1938, in addition to their ordinary duties which

they had been performing up to that time, also handled train orders and clearance cards, and some miscellaneous message work on the Morse, would you say the 74 cents an hour was the regular accepted rate for that job in that location after they had assumed the communications work they had not previously handled?

Mr. Davis: I object to that on the ground this witness is not shown qualified, and rates are a matter of negotiation between parties, and these were negotiated rates.

The Court: Objection sustained.

Mr. Dwyer: Exception.

Q. In short, the three men who had been working in the tower did not receive a raise in rate, did they?

A. The three men that previously worked in the tower did not receive an increase because two of them wasn't there.

Q. Where is the Buffalo Division in this book, in the front or in the back?

A. Not all the way back but pretty much back (indicating).

Mr. Dwyer: That is all.

Recross-examination.

By Mr. Davis:

Q. Just one or two more questions, Mr. West. Did I understand you to say that before May 1, 1938, the only person you talked with at the Elmira Yard office at any time was the Operator?

A. No, I would not say the only person I talked with was the Operator, but the Operator was the man whom we did the regular daily communication work with.

[fol. 237] Q. You did talk to the Yardmaster on occasion, didn't you?

A. If I had any occasion to talk to him, I would call him. If he had occasion to talk to me, I suppose he would do the same thing.

Q. And on occasion you did talk with the Crew Clerks too?

A. That may have been, but that was not the common practice.

Mr. Davis: That is all.

Redirect examination.

By Mr. Dwyer:

Q. You chin with everybody all the way up and down the line, don't you?

A. That is right. Even with the girls, I talk to them—sometimes.

Mr. Dwyer: That is all.

Witness excused.

MARION G. SLOCUM, a defendant, duly sworn as a witness in his own behalf, testified as follows:

Direct examination.

By Mr. Dwyer:

Q. Where do you live, Mr. Slocum?

A. Scranton, Pa.

Q. What is your occupation?

A. I am a Telegrapher; that is my trade.

Q. Who are you employed by?

A. Lackawanna Railroad.

Q. How long have you been employed on the Lackawanna?

A. Since May 2, 1909.

Q. What jobs have you held on the Lackawanna?

A. I started out in 1913, as a regular assigned man, at Owego.

Q. Operator?

A. Clerk Operator. I moved from there to Nicholson.

[fol. 238] Q. You have been an Operator all the time?

A. And Towerman.

Q. Have you been an Operator or Operator Towerman all the time?

A. Throughout, yes.

Q. When you first commenced working for the D. L. & W. was the Morse wire used extensively for communication work?

A. Yes, sir.

Q. By "communications work" we are only talking about operational communications now. We do not care anything about billing, or anything they use the mail for. Is that right?

A. That is right?

Q. You worked at various stations throughout the line, did you?

A. Yes, sir.

Q. And you became familiar with the routine handling of the communications which we are interested in?

A. Yes, sir.

Q. When did the telephone begin to supplement the Morse as one of the principal means of conveying operational messages?

A. They were using it for dispatching of trains in 1909 when I started; but for dispatching of trains and the individual message to the train to clear a certain location or to observe certain instructions, they used the telegraph for that,—the Dispatcher did.

Q. When did the telephone become in use for general communications work?

A. It gradually expanded on local lines, and the work that was originally being done by Morse entirely, gradually went over, and what could be done by telephone to expedite movements was done by telephone.

Q. And that is the situation that now exists; they are largely telephone works?

A. They are synonymous; telephone and telegraph.

[fol. 239] Q. Have the functions of the Telegrapher on the Road, as you knew them in 1909 and as you know them today, changed to any perceptible extent as to type of work handled, and what not?

A. No.

Q. What in the ordinary run of the day's business is the type of communication normally handled by Telegraphers or operators of one sort or another?

Mr. Davis: I am going to object to that. Let us limit the lawsuit to the Elmira Yard office.

The Court: Yes; let us limit it to this particular place.

Mr. Dwyer: If the Court please, it is claimed by the plaintiffs in this lawsuit that some time or other the situation has arisen, as I gather from their evidence or their claim, to where they can get along beautifully without Operators, and we are dealing here with what is known as a craft or class of employees certified for collective bargaining purposes, having a contract, one construction of which is sought to be placed upon that contract by the Plaintiff, and an other

by the Telegraphers, all boiling down to the proposition, which requires a determination, as to where certain specific message work belongs as a matter of collective bargaining; and I think that the historical background, the development of this work to its present state, the manner of handling it, all has a strong bearing upon the relationship of the parties [fol. 240] to this lawsuit, and has a strong bearing upon the intention of the parties when they entered into the contract in May, 1940. I do not know any other way to determine the relationship between the parties.

Mr. Evans: If your Honor please, it is perfectly evident that Telegraphers do a certain amount of telegraphic work as an Operator, and that the rest of the time is filled in with clerical work. If he is going into that subject,—I should think if it is admissible at all, and I do not think it is,—it seems to me he would have to specify the place and the time.

Mr. Dwyer: I will first discuss general practices and customs on the Railroad, and then we will get into places and times. I know no other way of approaching it.

The Court: Go ahead.

By Mr. Dwyer (continuing):

Mr. Dwyer: Read the question.

Q. (Read by Reporter) "What in the ordinary run of the day's business is the type of communication normally handled by Telegraphers or Operators of one sort or another?" (Continuing) As a matter of general practice in railroading?

Mr. Davis: I object to that as too general. I have no objection to his describing the work at Elmira.

Mr. Dwyer: There isn't any.

Mr. Davis: Thank you.

The Court: Overruled.

[fol. 241] Mr. Davis: Exception.

Mr. Dwyer: Read the question.

Q. (Read by Reporter) What in the ordinary run of the day's business is the type of communication normally handled by Telegraphers or Operators of one sort or another, as a matter of general practice in railroading?

A. Everything that is transmitted that is important enough to be written down.

Q. That is, messages which are recorded in some fashion or other upon receipt?

A. Of any respect; any conversation that is important enough to be written down and made a record of is considered communication service.

Q. You at the present time are General Chairman of the Lackawanna Division of the O. R. T., are you not?

A. Yes, sir.

Q. And have been how long?

A. Since the spring of 1943.

Q. You are also Local Chairman, or have been Local Chairman, of your own Division?

A. Yes, sir.

Q. How long were you Local Chairman?

A. Until this last spring.

Q. Commencing when?

A. In 1943.

Q. And since you have become General Chairman do you have occasion to go up and down the Road and stop at various stations and offices?

A. Yes, sir.

Q. And talk with and observe Operators and other people at work?

A. Yes, sir.

Q. Are you familiar with the general routine of the D. L. & W. concerning the handling of message work—the general routine?

A. I am.

[fol. 242] Q. You do it yourself, do you not?

A. Yes, sir.

Q. You are presently employed as an Operator, aren't you?

A. I am listed as a Towerman at the present time.

Q. Now can you tell us what message work, communications work, is ordinarily, in the ordinary course of business, handled on this particular railroad; that is, operational communications?

A. Am I to infer from that, that is being transmitted by telephone or telegraph?

Q. Anything: telephone or telegraph?

A. Anything that is in connection with the operation of the Railroad that is transmitted from one point to another, that is not ordinary mail.

Q. I am talking now about the transmission of messages concerning operational matters: the movement of trains, the conduct of trains, and so on and so forth?

A. Your train registers, and train consists, which consists of loads, and empties, and tonnage, and the different places, broke down in a more wide form, and the O-S ing of trains reports, and business reports in connection with the operation of the trains over different divisions, and messages of that nature, which would be hard to define and break down.

Q. Miscellaneous messages?

A. Miscellaneous messages.

Q. All having to do with the operation of trains?

A. Yes, sir.

Q. Do you know who, up to 1938 at least, on the Railroad, as a matter of general practice, handled communications of that nature which you have just told us about?

A. Yes, sir.

[fol. 243] Q. Who?

A. Employees covered by the Scope Rule of the Telegraphers' agreement.

Q. People commonly known as Telegraphers?

A. They could be whatever the Scope Rule would list them.

Q. Generally known as Telegraphers?

A. That is right.

Q. Since 1938 have you on occasion been in the Elmira Yard office?

A. Several times.

Q. Have you observed the Crew Clerks or a Crew Clerk in the Elmira office from time to time?

A. I have.

Q. Have you observed the operations carried on by those Clerks from time to time?

A. I have.

Q. Can you tell us specifically some occasion or occasions when you were there?

A. The one that is more vivid in my mind was the one when Mr. Moffatt was there.

Q. About when was that?

A. I think in February of 1943.

Q. Did you go there by appointment?

A. I went by appointment. That may not be the proper date but it was right along there. The record will show it, whatever the exchange of correspondence is.

Q. You had an exchange of correspondence that resulted in you and Mr. Moffatt meeting in Elmira, did you?

A. That is right, subsequent to a conference in New York. The conference in New York might have been in February, and possibly the conference here was a month or so afterwards—possibly in April.

[fol. 244] Q. I will show you these pieces of correspondence, and ask you if they refresh your recollection as to about when that occurred?.

A. This is the letter dated April 2nd—

Mr. Davis: Wait a minute. He only gave you those to refresh your recollection.

Mr. Evans: You read them yourself and see if that helps you give the date.

A. (Continuing:) This letter was written by—

Mr. Davis: Wait a minute. He wanted you to refresh your recollection as to the date you had the conference in Elmira with Mr. Moffatt.

Q. Do these letters help you to fix the date you met in Elmira with Mr. Moffatt?

A. Incidentally, the time is on here.

Q. Now you know about when it occurred?

A. That is right.

Mr. Evans: Tell us when.

Q. About when was it?

A. The letter indicates April 20th.

Q. Is that about when?

A. I connect the date with the letter.

Q. That, you say, was as the result of a conference you had had with Mr. Moffatt in New York?

A. That is right.

Q. The conference had occurred some time prior to that?

A. I think in February, yes.

Q. Did you discuss with Mr. Moffatt at that time the situation in Elmira?

A. Yes, we did.

Q. Who is "We"?

A. I think Vice-president Elliott was with us.

[fol. 245] Q. What was the subject of your discussion in Elmira?

A. We were insisting—

Mr. Davis: I object to his stating conclusions. Let us have the substance word for word of the conversation.

Q. You do not recall word for word all the conversation between you and Mr. Elliott and Mr. Moffatt?

A. That is right.

Q. Do you recall the substance of the conversation?

A. Yes.

Q. Can you now give us the substance of the conversation as it occurred between you and Mr. Elliott and Mr. Moffatt?

A. Yes.

Q. Will you please do so?

A. Upon Mr. Moffatt's suggestion, he wanted to meet me in Elmira on a date agreeable.

Q. For what did he want to meet you?

A. He wanted to make a personal check.

Q. Of what?

A. Of the duties we claim are within the Scope Rule of our agreement that were being performed in the Elmira Yard office.

Q. Did you discuss the Scope Rule?

A. Whereabouts, here or New York?

Q. Here.

A. Nothing was said.

Q. Except that it was within the Scope Rule?

A. Yes.

Q. You said these were involved?

A. Yes.

Q. When you got here what did you do?

A. Mr. Moffatt got generous: he paid the taxicab fare from the station.

Mr. Davis: I object to that and move to strike it out.

The Court: Strike it out.

[fol. 246] A. (Continuing:) Mr. Moffatt took the taxicab from the station to the Yard office, and on the way over he asked me if I had notified any of the employees I was coming. I told him no. I did not counter with a question like that to him.

Mr. Davis: I ask that be stricken out.

The Court: Strike it out.

Mr. Davis: And I ask the witness be instructed to give the conversation without any of these asides.

A. (Continuing:) Upon arrival at the Yard office we went in, and he sat on one side of L. C. O'Connell, who is present here.

Q. He is what?

A. He was the employee performing the service at the time.

Q. What is his classification, do you know?

A. I think he is listed as a Crew Clerk.

Q. He is not a Telegrapher or Operator?

A. He is not.

Q. You sat on one side and Mr. Moffatt on the other?

A. That is right.

Q. How long did you stay there?

A. I hope to have the concurrence of Mr. Moffatt, that we stayed about an hour.

Mr. Davis: I ask that be stricken out.

Mr. Dwyer: You are getting awfully touchy.

Mr. Davis: He is trying to put on a show for the benefit of his gallery back here.

Mr. Dwyer: You are getting awful touchy here.

The Court: Just confine yourself to answering the questions, Mr. Slocum.

[fol. 247] A. (Continuing:) Somewhere between one hour and an hour and a half.

Q. Did you observe the operations Mr. O'Connell was carrying on during that time?

A. Yes, sir.

Q. Will you tell us what you saw him do?

A. He received reaches or consists from Binghamton, which was the time the crew was on duty in Scranton, the Engineer, and the Conductor, and the contents of the train, the loads, the empties, and the tonnage. Also, there was a light movement coming, which was two engines with a flagman. They were out from Scranton to Buffalo. And he gave him the light movement, including the flagman's name. And I think there was an exchange—I won't be positive about it, but I think he gave him some stuff that was called out of Elmira in a like manner. And if I remember right, there were some reaches. Also there had been some crews called or something for a westbound train, and he gave the outgoing train register to the Dispatcher, and on that conversation, when Mr. O'Connell would get through talking to the party, from the nature of the conversation I knew who he was talking with, at which time Mr. Moffatt would then ask him who he was talking with, which would confirm what my knowledge was.

Q. Who was he talking with?

A. He was talking with Binghamton.

Q. Who down there, do you know?

A. I did not know the particular man at the moment because I wasn't in on the conversation on the line. I was listening to one end of the conversation.

[fol. 248] Q. Did he make a recording of things said to him, or did he make a recording of what he received on his end of the wire?

A. That is right; he wrote everything down.

Q. Are you familiar with this "Train Register"?

A. Yes.

Q. It is a large sheet?

A. It can be, yes. May I qualify my answer? It can be considered two forms of register. There can be a register book which is at starting places and terminating places of trains; or the terminal. Also at places of junction points, whereby the Conductor will go in and register his particular symbol, such as number or extra, and his name, and his Flagman's name, and that becomes a permanent record at that place for subsequent trains; as to what scheduled trains had gone. This is particularly necessary in operation of single track in such places. However, it is followed through in general practice on each terminal.

Then there is what we call a "Train Register," which is broken down into a little bit different form given to the Dispatcher, such as the Engineer, and the Conductor, and the time on duty, and the number of the engine, and the Consist, which is a brief form, such as total loads, total empties, and tonnage.

That is the two forms of register. Invariably the places where the book is before the Operator he will give that information right from the book. There are some places it is not before the Operator, and there are some places that trains register by message, or a written form, which is put in the book for registry for the crew.

[fol. 249] Q. On this occasion you were in Elmira, that is, with Mr. Moffatt, did you see the train register or registry sheet on the Clerk's desk?

A. In other words, the train register book was not there; it was a form that is filled in.

Q. Did it have all the data concerning the trains?

A. It had all the data concerning the trains which the

employees give the Train Register, as I have said before, to the Dispatcher.

Q. Did you discuss the fact this registry sheet, or whatever it might be, was on the desk, with Mr. Moffatt?

A. I think I did, and also—I don't know whether I did it in the presence of Mr. Moffatt or not, but I think I did—I asked Mr. O'Connell if that was the same form that was being used when he came over in there, and he said it was.

Q. When did he come in there, do you know?

A. 1938.

Q. Is the name O'Connell or O'Connor?

A. O'Connell.

Q. On how many occasions did you discuss the Elmira situation, either alone or with others, with anybody representing the Management of the D. L. & W.?

A. I have discussed it with Mr. Moffatt one time in New York, and the time in Elmira.

Q. I show you a letter dated September 27, 1943, addressed to E. B. Moffatt, and signed by you, I believe, and I ask you if you wrote that letter to Mr. Moffatt?

A. That is right.

Mr. Dwyer: I offer it in evidence.

Mr. Davis: I object to this. It states a lot of facts which [fol. 250] have not been proven. I do not object to the fact the letter was written and was received.

Mr. Dwyer: It is submitted on the same theory, if the Court please, just to show this was a continuing dispute.

Mr. Davis: I will consent it is a continuing dispute.

The Court: I will receive it on that theory.

(Letter, Mr. Slocum to Mr. Moffatt, dated — 27, 1943, received and marked: Defendant's Exhibit F.)

Q. I show you a letter dated June 27, 1943, addressed to Mr. Shoemaker. Did you write that?

A. I did.

Mr. Dwyer: I offer that in evidence.

Mr. Evans: For the same purpose, Mr. Dwyer?

Mr. Dwyer: Just to fix the time and show what was done.

The Court: Received.

(Letter, Mr. Slocum to Mr. Shoemaker, dated June 27, 1943, received and marked: Defendant's Exhibit G.)

Q. I show you a letter dated August 6, 1943. Did you write that to Mr. Shoemaker?

A. I did.

Mr. Dwyer: I offer that in evidence.

Mr. Davis: Offered for the same purpose?

Mr. Dwyer: Yes.

The Court: Received.

(Letter, Mr. Slocum to Mr. Shoemaker, dated August 6, [fol. 251] 1943; received and marked: Defendant's Exhibit II).

Q. Here is another, dated September 1, 1943, addressed to Mr. Ray. Did you write and send that to Mr. Ray?

A. I did.

Mr. Dwyer: I offer that in evidence.

Mr. Davis: For the same purpose?

Mr. Dwyer: Yes.

The Court: Received.

(Letter, Mr. Slocum to Mr. Ray, dated Sept. 1, 1943, received and marked: Defendant's Exhibit I).

Mr. Davis: These are all for the same purpose, and not as proof of the facts or claims.

Q. Have you received a reply to any of the four letters just introduced in evidence?

A. I do not believe I have.

Q. As General Chairman of the Lackawanna Division of the O. R. T., you have participated in discussion of affairs concerning the organization with the General Committee, have you?

A. Yes, sir.

Q. And you have discussed the affairs of the organization, as you have related, with representatives of the Management?

A. Yes, as I have stated here before.

Q. Have you ever discussed, either in discussion with the Management or in discussion with the General Committee in session, the proposition that the organization waived any rights that it might have in the representation of persons performing a class of work in the Elmira area?

[fol. 252] Mr. Davis: I object to that, in so far as it pertains to discussions with the General Committee. I have

no objection to discussions with the Railroad representatives.

The Court: Objection sustained.

Mr. Dwyer: Exception.

Q. Have you ever discussed or heard discussed, or known of a discussion by yourself or any of the members of the General Committee with Management or representatives of Management, of any waiver on the part of your organization of its right to represent those persons performing a designated class of service in the Elmira Yard office?

Mr. Davis: I object to that as calling for a conclusion of the witness, and it involves a question of hearsay. The question was: "Has he ever heard"?

Mr. Dwyer: "Discussed with Management."

The Court: Overruled.

Mr. Davis: Exception.

Q. Have you ever heard any such conversation?

A. No, sir.

Q. Has the Management ever discussed with you the proposition that the organization is only entitled to represent those persons designated in the Rate Schedule attached to your contract?

A. No, sir.

Q. Have you been engaged in adjusting grievances, and discussing who is entitled to certain jobs, and things of that kind?

A. Yes, sir.

Q. On behalf of the organization?

A. Yes, sir.

[fol. 253] Q. In determining who is entitled to a certain job, what procedure is followed? Is that which you told us about the meeting with Mr. Moffatt down here a fair example?

A. The procedure followed is in accordance with applicable rules of the agreement.

Q. Is that what you do?

A. Will you clarify your question, please?

Q. How is it determined, on the single basis of whether it is a job designated in the book, or is it determined on the basis of what the man does?

Mr. Evans: Determined by whom?

Mr. Dwyer: By anybody.

A. New jobs or present jobs?

Q. Any jobs?

A. We follow the Scope Rule.

Q. Are the persons on the jobs designated in the Scope Rule of your contract on well recognized railroading operations.

Mr. Davis: I object to that.

Mr. Dwyer: I will withdraw it and do it the long way.

Q. You have been engaged in railroading since 1909?

A. That is right.

Q. You have known a great many people employed in the service?

A. A few.

Q. A great number?

A. Yes, sir.

Mr. Davis: Wait a minute; he said "A few."

Mr. Dwyer: I am getting tired.

Mr. Davis: So am I.

Mr. Dwyer: Let's have a recess then and all get rested.

[fol. 254] Q. And you have worked up and down the road, haven't you?

A. Yes, sir.

Q. Have you known Telegraphers, Telephone Operators, Agents, Assistant Agents, Agent Telegraphers, Agent Telephoners, Towermen, Levermen, Trainmen, and Train Directors, Wire Chiefs, Managers of Telegraphic Offices, and Operators of Mechanical Telegraphic Machines installed for the purpose of replacing telegraphic communications; have you known persons employed in those occupations in all those years?

A. I think I have.

Q. Are you more or less familiar with what is involved in the operation of those jobs?

A. Yes, sir.

Q. Can you tell us: is each one of those jobs a well recognized job, with a definite scope of operation on the Railroad?

A. Yes.

Q. And has been all along?

A. Yes.

Mr. Dwyer: You may ask.

(Discussion off record about adjournment.)

Mr. Dwyer: Will the Court direct the people who have been subpoenaed here this morning to return Thursday morning?

The Court: Yes. All witnesses here will return Thursday morning at 9:30.

(Recess 3:30 P. M. to 9:30 A. M., Thursday, August 9, 1945.)

August 9, 1945. Supreme Court Chambers, Elmira, N. Y.
Morning Session commencing at 9:30 o'clock.
Trial Continued.

[fol. 255] MARION G. SLOCUM, Defendant, re-called to the witness stand, testified as follows:

Cross examination.

By Mr. Davis:

Q. Mr. Slocum, am I correct that you stated on your direct examination that everything that is transmitted by telephone, and written down by the one receiving it, is Telegraphers' work?

A. If it is important enough to be written down, it comes within the Scope Rule of the Telegraphers' Union.

Q. That is your opinion?

A. That is my opinion.

Q. And you contend that both the sender and receiver of that information must be Operators or Telegraphers?

A. Under certain conditions.

Q. What are the conditions?

A. If a Dispatcher is sending a message to an operator: direct instructions to a train to take a siding, or some mechanical equipment that is improper, or something like that, that is perfectly all right for the Dispatcher to send those messages in conjunction with his routine train operations.

Q. Supposing a Dispatcher wants to know the cause of a five minute delay at Chemung 30 days ago, does he have to get that information on a telephone from an Operator?

A. Will you clarify your question, Mr. Davis, as to where he directs the message to get this information?

Q. He calls the person at Chemung.

A. How can he call the person at Chemung 30 days after the incident?

Q. He calls a person in the station at Chemung?

[fol. 256] A. There is no person in the station at Chemung.

Q. Assuming there is one, has he got to get the information from the Operator?

A. If there is an Operator on duty, and it is in the form of a message, he must get it from the Operator.

Q. In other words, you take the position that a message must be transmitted to the Dispatcher by an Operator?

A. In the hypothetical question, yes.

Q. In other words, as I get your answer to the previous question, you claim the Train Dispatchers are now doing certain work which Telegraphers should be doing?

A. If it is work in transmission of messages that is not in direct operation of the train movements, messages of diversion and stuff like that, that should be performed by Operators.

Q. General information transmitted by the Train Dispatcher to an Operator; do you say that must be transmitted by an Operator too?

A. If it is not operation of the train.

Q. I believe you testified you worked as an operator at Owego and Nichols.

A. Owego, when I started out in 1913.

Q. What were your duties at that time as an Operator in Owego? Did you sell tickets?

A. General routine and office work, everything connected with it.

Q. You sold tickets, didn't you?

A. That is part of the duties, yes.

Q. Did you clean out the station at that time?

A. I think I was required to do some mopping at that time, which I did.

[fol. 257] Q. Did you handle station correspondence on your trick?

A. Will you break that down?

Q. Did you write letters?

A. If they were directed to me, I answered them, yes.

Q. Did you make out any demurrage reports?

A. It was not assigned to the office of that particular place.

Q. Did you make out reports of the sales of tickets you made on your trick?

A. We made a daily ticket sheet, and checked in and out of the money drawer,—if there was a shortage, and so forth.

Q. And the work of selling tickets, and station correspondence, and cleaning out the station, and those duties, were the major part of your work?

A. Those were incidental to my regular routine of work?

Q. What was your regular routine of work?

A. The O-S-ing of trains, consists, sending of messages, and so forth. And there was a branch then,—the Ithaca branch.

Q. A person who sells tickets, that is classified as clerical work, isn't it?

A. I wouldn't know that.

Q. A person that bills freight, that is clerical work, isn't it?

A. I wouldn't know that.

Q. Have you any written authorization, by a Telegrapher on the Division, to handle the claim you made in connection with the Elmira Yard case?

A. I have not.

Q. Did you have any oral authorization?

A. Clarify that, please.

Q. Did any Telegrapher on the Buffalo Division orally ask you to present a claim to the Railroad Company on [fol. 258] account of the Elmira Yard case?

A. May I answer that in this way: There are many, many, on the Buffalo Division, as well as the Scranton Division.

Q. Confine it to the Buffalo Division, please?

A. During this time it was a part of the Scranton Division, a junction between the two Divisions, therefore the men of the Scranton Division were as interested as anybody else; they worked with the men in Elmira. Certainly, I had it called to my attention repeatedly.

Q. Did any man on his behalf ask you to handle a claim?

A. I considered it, whether it was a claim or not, to handle it for correction.

Q. Did you understand my question?

A. I think so.

Q. Can you answer it yes or no, whether any individual man asked you to handle a claim on his behalf with the Railroad?

A. Yes, I believe there was.

Q. Who was the man?

A. There were several.

Mr. Dwyer: Let me ask: are we now referring to money claims?

Mr. Davis: He has made a claim. The nature of the claim is in evidence in the letters.

Mr. Dwyer: Might I call your Honor's attention to the fact that there are two features to this situation: one is the claim by the organization, jurisdictional in nature, and the other is the claim on behalf of the individual employee of a money award. To which are we referring?

[fol. 259] Mr. Davis: We are referring to the claim that Mr. Slocum wrote about to Mr. Moffatt.

Mr. Dwyer: Which portion of the claim?

Mr. Davis: Referring to the claim Mr. Slocum made to Mr. Moffatt in his letter of October 16, 1942, in which it is stated: "Our claim is that three extra board employees be paid a day's pay each for each day the present practice continues."

The Witness: I notice this letter is not over my signature.

Q. It is Mr. Elliott's letter?

A. Yes.

Q. You do not subscribe to that claim?

A. The claim was instituted before it came to me.

Q. You wrote Plaintiff's Exhibit 16, didn't you, Mr. Slocum?

A. Yes, sir.

Q. And in Plaintiff's Exhibit 16 you state: "Our claim is that three extra board employees be paid a day's pay each for each day the present practice continues, and retroactive to the date the practice was put into effect"?

A. That is what the letter says.

Q. When did you first become an officer in the Telegraphers' organization?

A. In early 1943.

Q. Then you had nothing to do with any agreements that were made prior to that time, did you?

A. I didn't participate in any individual agreements.

Q. Did you and Mr. Moffatt discuss as to what work the Crew Callers were here performing along with the Telegraphers' organization?

A. On what date?

[fol. 260] Q. When you made your checkup here?

A. No.

Q. Is it also your position, Mr. Slocum, that the Rate Schedule, as printed in the agreement, Exhibit 10, is not a part of that agreement?

A. It is an identification of positions and rates.

Q. In other words, you agree with Mr. Chadwick it is merely information appended to the agreement?

A. As I say, it is information as to the agreement. Might I clear up on that?

Q. Is it further your opinion that this list of positions attached to the agreement is not necessarily correct or inclusive?

A. Not necessarily correct?

Q. Yes.

A. Or inclusive?

Q. That is right.

A. As I stated before, it is for the purpose of identification; and to further clarify that answer in that respect, I want to refer to Rule 12-A of the Telegraphers' agreement, which reads: "When existing payroll classification does not conform to Rule 1, employees performing service in the classes specified therein shall be classified in accordance therewith." Therefore, if that was considered other than what we have stated, there would be no necessity for Rule 12-A, as I can see it.

Q. In other words, your position is that the payroll classification then determines the position?

A. No.

Mr. Dwyer: I do not understand that.

Mr. Davis: He is answering the questions.

Mr. Dwyer: I object to it as not being a sufficiently clear [fol. 261] question to permit an answer. It determines what about positions, whether it is included within the scope of the agreement or not? Is that the question?

A. (Continuing:) Will you clarify your question?

Q. Would you have asked me to clarify that if Mr. Dwyer had not interrupted?

A. It was my intention eventually, yes.

Q. You started to answer, didn't you?

A. (No response.)

Q. Rule 10 of Exhibit 10 names positions, doesn't it?

A. It names classifications, does it not? It does not name individual positions.

Q. It gives titles,—is that what you mean?

A. Not necessarily.

Q. Does it define duties?

A. It has respect to duties, yes.

Q. Is there anything in there that says what the duties of an Agent are?

A. The wording of it does not, no.

Q. Is there anything anywhere in the agreement which says what work must be performed by an Agent?

A. We know——

Q. Wait a minute. Is there anything in the agreement which says what work must be performed by an Agent?

A. I do not read anything in it, no.

Q. Is there anything in the agreement which says what work must be performed by an Agent Telegrapher?

A. It does not read here, no.

Q. When you say "It does not read here," you mean there is no language there which defines the work of an [fol. 262] Agent Telegrapher?

A. It is our understanding of what it means.

Q. There is nothing in the agreement, is there?

A. I will say yes.

Q. Where?

A. For the simple reason——

Q. Wait. You just point out to Judge Newman where that language is in the agreement?

Mr. Dwyer: We all know it is not in the language of the agreement. We are wasting a lot of time quibbling about nothing.

Mr. Davis: Do you agree there is nothing in the agreement which defines the work of these positions?

Mr. Dwyer: Yes.

Mr. Davis: All right; thank you.

Mr. Dwyer: It is a self-evident fact upon the reading of the contract.

Q. I believe you stated on your direct examination you were at the Elmira office about an hour and a half at the time you made the investigation?

A. It was somewhere along there. I do not know exactly.

Q. So when you testified, you testified to only what happened during the hour and a half you were there?

A. That is what the question asked for that was directed to me.

Q. Did you make any record of the amount of time the Crew Clerk was talking on the telephone during that hour and a half?

A. I rather thought possibly twice or three times some individual employee, whom I took to be a Conductor or a Trainman, called up to see how many times he was out, and I think once there was some employee that had been [fol. 263] called that said he couldn't make it, and another employee was substituted. That was the only conversations during that time which was connected with Crew Calling.

Q. How many times, during the hour and a half you were at the Yard office, did the Crew Clerk talk to some other point?

A. I think outside of conversing with us, maybe 10 or 15 minutes he was talking.

Q. Was he talking or waiting to get the wire?

A. We heard conversation taking place.

Q. You do not know whether the conversation was directed to the Crew Clerk or was directed to some other place?

A. From my understanding it was connected with the arrival of trains, direction of trains, and consists.

Q. What time during the day was that check you made?

A. We arrived on No. 3 and proceeded directly over.

Q. No. 3 gets in here about four o'clock, is that right?

A. I think that is about right.

Q. What messages did the Crew Clerk send while you were there?

A. As I answered before, it was purely conversational.

Q. Did he answer any train orders?

A. Naturally not, or they would have been transferred over to the tower.

Q. Then your answer is no?

A. Yes.

Q. What did he say?

A. As I told you, there was conversation taking place all the while. I have enumerated to you what I remember vividly. The rest you can't hardly remember a man's conversation in that length of time unless there was some [fol. 264] specific thing. As I say, I do recollect vividly in regard to loads and empties.

Q. General information that was transmitted?

A. That would not be considered general information.

Mr. Davis: I think that is all, Mr. Slocum.

Cross-examination.

By Mr. McEwen:

Q. Mr. Slocum, to clarify some of the matters you testified to on direct examination. As I recall, you made a statement to the effect that where work is written down, you claim that as being work of the Telegraphers' craft? Now if I understand you correct, what you meant was that where work is written down at both ends of a communication operation, isn't that correct?

A. It may not be written down. It has to be prior written down for the man at one end to send it.

Q. You do not mean to say all work that is written is claimed by the Telegraphers' organization as within their scope?

A. Written or sent, do I understand?

Q. Written or sent, both?

A. May I state this way: regardless of what it is, a form of report, or whatever it is in that respect, if it is handed to an employee and transmitted over the wire, and that is taken verbatim, or one part of it is written down which becomes a record, although it might not become a permanent record, but it becomes a record in the incidental operation of the road, in other words, that is transmission from one part of the road to the other, that falls within the Scope Rules of the Telegraphers' agreement.

[fol. 265] Q. The payroll reports, for example, are written down?

A. They are compiled.

Q. You do not claim the right to write down payroll reports?

A. I do not know of any instance except where it is an Agent that makes out his own payroll.

Q. Those that are made in the general offices of the Railroad Company, you do not claim the right to do that?

A. Absolutely not, sir.

Q. This check you made at the Elmira Yard, Mr. Slocum, you said that was made, as I understand you, in a period of about one hour on one occasion?

A. It was with Mr. Moffatt. Yes, it was approximately an hour; it might vary.

Q. You haven't any idea what that man was doing during the other hours of the day that you were not there?

A. If you are speaking specifically about this one day, not a comparison,—I have been there several times, and have been on the wire,——

Q. I am asking about the day you spent in Elmira. You have no idea what that man was doing the other hours that day, that specific day?

A. No, not that specific day.

Q. You have no idea what the men occupying the other shifts at Elmira were doing on that specific day either?

A. No, because I came from Scranton with Mr. Moffatt and returned directly to Scranton, on that particular day.

Q. You made no written record of this check you made?

A. Mr. Moffatt did not request it, and we did not make it. It was purely visible.

Q. You did not write down what you saw? You did not [fol. 266] make any memorandum of it to keep?

A. Not at that particular time, no.

Q. You said something on cross examination to the effect that while you yourself were working as an Operator at Owego, I believe, that you performed work in the sale of tickets at that point?

A. That is right.

Q. Is it your understanding of the Scope Rule of your agreement that it includes the sale of tickets generally?

A. To answer that correctly,—I can't answer it.

Q. You do not know then whether ticket selling is within the Scope Rule?

A. There is certain ticket selling in the Scope Rule, but as you asked on a general basis, there might be certain positions it can be applied to or not applied to.

Q. You do not find anything in your agreement that mentions ticket selling at all, do you?

A. It is not specifically set out in the wording thereof.

Q. As a general proposition, clerical work, station work, is not claimed by your organization either, is it?

A. Would you clarify the question?

Q. You do not claim the right to perform clerical work as such, do you?

A. Do you mean every employee in the station?

Q. I mean the members of your organization, do you claim the right to perform clerical work?

Mr. Dwyer: Do you mean that generally, or incidental to the position as Operator or Telegrapher?

Q. (Continuing:) I ask about it generally?

A. We have always performed clerical work incidental to the position in connection with the transmission of messages and stuff like that.

[fol. 267] Q. I do not think that is quite an answer to the question. I am asking whether you claim the right to perform clerical work generally?

A. Not generally; only that is incidental to or in connection with the positions.

Q. How do you determine what is in connection with or incidental to your positions?

A. As heretofore we have done the work.

Q. In other words, if the Railroad says "You do some clerical work," it belongs to you, is that it?

A. I would not state it that way. If they assigned certain clerical work to a man on one of our positions, there has been no question so far that he was required to perform that work.

Q. Suppose they take it away from you, have you any complaint to make?

A. They have taken clerical work away many times and we have never made any complaint.

Q. So it is just a question of what the Railroad giveth and what the Railroad taketh away, is that it?

A. In other words, we have never broken down to what actual specified kinds of work falls within that category. It might be today there might be some particular report that the particular employee was performing or had done, and they might take that particular report over and assign it somewhere else. There has been no dispute about that.

Mr. McEwen: That is all.

Redirect examination.

By Mr. Dwyer:

Q. As I understand it, Mr. Slocum, your organization claims jurisdiction principally, or that is, sole jurisdiction,

[fol. 268] over the operations concerning the transmission of communications is that right?

A. Yes, sir.

Q. And that the employees enumerated in the Scope Rule of your agreement, many of them, in addition to performing work concerning the transmission of communications, also perform some clerical or other work incidental to that position?

A. Practically; yes, sir.

Mr. McEwen: I object. This is re-direct examination, and I would prefer the witness do the testifying.

The Court: Sustained.

Q. Well, does your organization claim jurisdiction over all the communications work that has been described here?

A. Yes, sir.

Mr. Dwyer: I think that is all.

Recross examination.

By Mr. Davis:

Q. In connection with this clerical work, if the Telegrapher work is removed from the station and there is no telephone there, and there is just the clerical work left, do you claim that work?

A. If there is nothing there but clerical work, we certainly do not perform it.

Q. Even though that clerical work had before been performed by Telegraphers?

A. Would you clarify your question as to what would be the nature of the clerical work you have reference to?

Q. Selling tickets, making up reports to be transmitted by mail, attending to station correspondence, and the incidental work of the station, such as you have described that [fol. 269] you performed when you were working at Owego,—and no communications?

A. I am a bit confused, Mr. Davis, as to just what you mean, as you have set out certain classes of work, not clerical work on a general basis, so therefore I am confused in making a proper answer to you.

Q. Do you remember the work you did, other than telephone or telegraph work, at Owego?

A. Yes.

Q. Now let us assume that at Owego where you used to work, the telephone was removed and the telegraph was removed, so that all that was left there was the other work: selling tickets and mopping out the station, do you still claim that work is work which belongs to Telegraphers?

Mr. Hassenauer: I object to that question. I think it should be confined to the situation as it exists in the Elmira Yard. That is, the only position in dispute here is as to the Crew Callers and Telegraphers in the Elmira Yard, and I think the question should be confined to the work being performed there. It does not apply generally over this Road. We have no dispute with the Management regarding the work of the employees except at the Elmira Yard. I think the objection should be sustained.

The Court: Overruled.

Mr. Hassenauer: Exception.

A. I can't answer that question.

Q. You can't answer it?

A. No, sir.

Q. Then it is not very clear in your mind, is it, what is Telegraphers' work and what is Clerical work?

A. Yes.

[fol. 276]. Q. Can you now answer the question?

A. There are many positions listed in our attachment to the Schedule that lists Ticket Agent, which is considered an Agent selling tickets, therefore we might put in contrast the one with the other,—and that is my answer.

Q. In other words, you do attach some importance to the Schedule attached to Exhibit 10?

A. As to identification of jobs.

Q. While you were at the Elmira office did you hear the Clerk O-S any train?

A. That particular part, I do not know whether he O-S-ed a train in or out or not, which is what you term the time of arrival or time of departure. I do not think he did at that time.

Q. Did he receive or transmit any messages?

A. I can't state definitely, whether this flagging in connection with two light engines coming west—he wrote it on a pad and also put it on the register sheet, but I don't know whether he eventually filled that out on a form to be transmitted to Buffalo or not. I don't know.

Q. You do not know?

A. I do not recall at this minute.

Mr. Davis: That is all.

Redirect examination.

By Mr. Dwyer:

Q. He did take information and enter it on the register sheet, did he?

A. Yes.

Mr. Dwyer: That is all.

Recross-examination.

By Mr. Davis:

Q. Did you object to that?

A. When he writes it down and it is a record, yes.

[fol. 271] Q. Even though it is handed to him by a Conductor?

A. This question you asked me was, if when this particular man got the information and wrote it down, if I objected to it, and I said yes.

Q. I was trying to see if I understood your answer?

A. It is clear to you now?

Q. No. If a Conductor comes in and hands the Crew Clerk a piece of paper on which there is writing and the Crew Clerk transfers the information on to a sheet in front of him, do you claim this work?

A. Not from one sheet to another, no.

Mr. Davis: That is all.

Redirect examination.

By Mr. Dwyer:

Q. But if he takes it off, the information, that is, isn't it?

A. Yes.

Q. And if he takes it off, that sheet and transfers it over the wire to some other point, that also is?

A. Yes.

Mr. Dwyer: That is all.

Recross examination.

By Mr. McEwen:

Q. Drawing your attention now to the situation of the Elmira Yard, I want to get a clearer picture of what the claim of your organization has been as to those three positions. Is it your claim that the three clerical employees that are now performing those positions of Crew Clerks should be released from those positions and three Telegraphers put on those jobs?

A. We are asking for the communications service, Mr. McEwen.

Q. But you are not asking that those three jobs be re-[fol. 272] classified as Telegraphers' jobs and Telegraphers be assigned?

A. We are asking for the communications only.

Q. I do not think that is an answer to my original question. Are you asking that the Crew Clerk's jobs at the Elmira office be reclassified as Telegraphers' jobs and Telegraphers assigned to those jobs?

A. We are not asking for the clerical work in connection with the Crew Callers' work.

Q. Will you answer the question?

Q. (Read by Reporter:) I do not think that is an answer to my original question. Are you asking that the Crew Clerks' jobs at the Elmira office be reclassified as Telegraphers' jobs and Telegraphers assigned to those jobs?

A. I think our claim was for the communications service only.

Q. You do not claim the jobs then?

A. No.

Q. You merely claim the communications work, if there is any, connected with those jobs?

A. We claim all the communications work.

Mr. McEwen: That is all.

Recross examination.

By Mr. Davis:

Q. In other words, you want six men up there to do three men's work, is that so?

A. That is the Carrier's prerogative.

Q. Isn't that right?

A. We want to perform the service that properly falls within the purview of our Scope Rule. If there is enough work that requires one man, we want the one man. If there is enough work that requires 15 men, we want the 15 men.

Q. Do you remember a moment ago we were talking about a piece of paper the Conductor brought in and handed to the (fol. 273) Crew Clerk, and the Crew Clerk put the information down on a piece of paper?

A. Yes.

Q. Suppose Mr. Shoemaker calls up from New York and asks the Crew Clerk what information he has got that came off the Conductor's paper, is that doing Dispatcher's work?

A. Mr. Shoemaker has talked to me several times. He has quite an alert mind to remember things, and incidentally, when he calls up for this information, he pictures it in his mind and seldom writes it down. I do not think he ever writes it down. We have no objection to a mere conversation. It is not made a matter of record.

Q. Suppose he puts it down on a piece of paper and tells his clerk to put it in a file and keep it for further reference?

A. I would know nothing about that.

Q. Is that Telegraphers' work?

A. If it is in general message form. Of course we have no part in conversations and like that.

Q. Suppose Mr. Shoemaker asks his Chief Clerk to call up and get this information?

A. If the Chief Clerk keeps records and things like that, that is a matter of record.

Q. If he makes a memorandum to give to Mr. Shoemaker, which subsequently finds its way into a file?

A. Will you differentiate between a memorandum and a permanent record?

Q. He takes a piece of yellow paper and he writes down on it: "Extra 16, West, delay 10 minutes at Elmira."

A. That is communication.

Q. In your opinion?

A. That is right, sir.

Mr. Davis: That is all.

[fol. 274] Redirect examination.

By Mr. Dwyer:

Q. Is it communications service if that is not connected with the movement of a train, if it is merely connected with an inquiry by an official of the Road for his own information concerning operations?

A. No, that is conversation.

Mr. Dwyer: That is all.

Redirect examination.

By Mr. Hassenauer:

Q. You admit, do you not, the Management has a right to call any employee of the Road and ask for any information he desires?

A. Yes, sir.

Q. That does not make it necessary for the man of whom the question is asked to say: "I cannot answer that question because it is not within my prerogative"?

A. No.

Mr. Davis: I object, and ask the answer be stricken out.

The Court: Strike it out.

Mr. Hassenauer: That is all.

Witness excused.

Edward A. OREUTT, duly sworn as a witness on behalf of the Defendant Slocum, testified as follows:

Direct examination.

By Mr. Dwyer:

Q. What is your occupation, Mr. Orecutt?

A. At the present time I am Telegraph Operator and Clerk.

Q. Where?

A. In Bath, New York.

[fol. 275] Q. Employed by the D. L. & W.?

A. Yes, sir.

Q. How long have you been employed by the D. L. & W.?

A. Since January 13, 1926.

Q. During all that time have you been employed as an Operator or Operator Clerk?

A. Operator, Operator Clerk, and Towerman.

Q. Was there a time you were employed as an Operator at the Elmira Yard office?

A. Yes, sir.

Q. During what period of time were you so employed?

A. If I remember right, it was in 1936 I took a regular job on the third trick there.

Q. And worked there until when?

A. Until the job was abolished.

Q. Had you previously worked there as an extra?

A. As extra, yes.

Q. Over what period of time?

A. Not very much, because I wasn't working extra very much. It was probably two or three times that I was there.

Q. During the time you were an Operator in the Elmira Yard office can you tell us what communication work you handled as a matter of general routine?

A. Well, I worked with both Buffalo and Scranton Dispatchers at that time.

Q. With the Dispatchers?

A. Yes.

Q. What information did you convey to the Dispatchers as a matter of routine?

A. Well, I would get the reaches of all trains coming to Elmira both directions.

Q. A reach being a message stating the time of arrival at this station?

A. Yes, sir.

[fol. 276] Q. Go ahead and describe your duties?

A. That would be put on a piece of paper and taken off by the Crew Clerk in the other office.

Q. On the basis of that information the Clerk would crew up the train at that time, is that correct?

A. Yes. After it was crewed up he would tell me who the crew was, and I would put it on my daily record of the time, the Conductor's name, Engineer, engine number, symbol of the train, what it was carrying.

Q. What became of that information?

A. That was the daily record, kept every day.

Q. What information did you furnish the Dispatcher then?

A. As the trains left Elmira going west I would give him the number of loads, the empties, and the tonnage.

Q. That is the consist?

A. That is the consist.

Q. That affected trains going either direction?

A. Going in both directions.

Q. The Dispatcher being in Buffalo, is that correct?

A. Yes, sir.

Q. These messages, of course, were transmitted over the telephone?

A. By telephone.

Q. Then did you also furnish the Scranton Dispatcher with information?

A. Yes, sir.

Q. In other words, a train going in the east direction, what became of the consist for the eastbound train?

A. I gave that to Scranton, and also gave it to Binghamton.

Q. A train going west, what did you do with the consist?

A. Just to Buffalo.

Q. You say the eastbound train, you gave the consists to [fol. 277] Scranton in broken up form?

A. Yes, sir.

Q. What do you mean by "broken up form"?

A. To show the number of cars for Binghamton, number and the tonnage for the D. & H., the tonnage for Scranton, the tonnage for the through cars like Port Morris or Hoboken.

Q. In other words, by the cars for Binghamton or Scranton, you mean the number of cars to be set off at each place?

A. Yes.

Q. And the tonnage of those cars?

A. Yes, sir.

Q. And the tonnage of the through cars?

A. Yes.

Q. You also received consists, did you?

A. Yes, sir.

Q. Who did you receive them from?

A. I got the eastbound consists from Dansville. We got the westbound from Owego.

Q. What did you do with the consists you received?

A. Well, they were practically both recorded in a book. The eastbound would show the number of cars if any for

Elmira, and the tonnage, and the setoffs; and the same for westbound, so many cars, and tonnage, and through cars, and setoffs. They were all recorded in a book.

Q. Who used this book for information purposes?

A. The Yardmaster.

Q. And that book in which these consists were registered was in the office in which you worked, was it?

A. They were generally there unless he had them in the other room. Sometimes you would have to go in and get them if you wanted them.

[fol. 278] Q. And did you do other message work besides handling consists, Mr. Orcutt?

A. Well, we sent consists to East Buffalo, and drill reports.

Q. That is, to the Yard office in East Buffalo?

A. Yes.

Q. In addition to the Dispatcher at Buffalo?

A. Yes.

Q. At the present time you are working in Bath?

A. Yes, sir.

Q. You are handling message work there in addition to other things, are you?

A. Yes, sir.

Q. Does that take you on the wire quite frequently?

A. Well, I am on there quite a lot, reporting trains, or any other communication that I have.

Q. When you want to put a message over the wire yourself, a telephone, what do you do, pick up the telephone and immediately get the person to whom you are directing the message?

A. It is according to what 'phone they are on. If you are on the Dispatcher's, you just pick up the telephone. If they are in Elmira, say, you have to await your turn.

Q. Have you had occasion, while awaiting your turn, to stay on the wire and hear messages going over the wire from one point to another?

A. Every day.

Q. Do you know the voices of the people who are commonly talking on this message wire, you use?

A. I would say yes; that is, the regular assigned men.

Q. Do you know where the regular assigned men work?

A. Well, all the Buffalo men; not so much East Buffalo.
[fol. 279] Elmira Yards, Corning, any of those.

Q. You are familiar with those men and their voices, are you?

A. Yes, sir.

Q. And while you have been on the wire awaiting your turn to transmit a message, have you heard the men you know to be working in the Elmira Yard office communicate with other people?

A. Well, you can hardly pick up the 'phone unless you hear them on there.

Mr. Davis: I object to that. That can be answered yes or no.

A. (Continuing:) Yes.

Q. Do you hear them frequently?

A. Very frequent.

Q. Is it the same man that always works the same trick, that you do?

A. He is on, I think, from three to eleven. I wouldn't say what his hours are.

Mr. Davis: I object to what he thinks.

The Court: Sustained.

Mr. Davis: I move to strike it out.

The Court: Yes, strike it out.

Q. As you hear it over the line, is it the same man talking?

A. Yes.

Mr. Davis: I object to it as leading.

The Court: Overruled.

Mr. Davis: Exception.

Q. What messages do you hear, and from what points do you hear them?

Mr. Davis: I object to it as hearsay, and not the best evidence, and incompetent.

Mr. Dwyer: There is no writing we can bring in.

[fol. 280] Mr. Davis: You can get all the men here that have been doing all the talking.

The Court: Overruled.

Mr. Davis: Exception.

Q. (Read by Reporter:) What messages do you hear, and from what points do you hear them? (Continuing by Mr. Dwyer:) Concerning the Elmira Yard office?

A. Well, I hear the crews being called, the consists of trains, the makeup of the trains, whether they are solid Buffalos, or whether there is any switching on them at different points. Of course, the train takes in the Conductor, the Engineer, the engine number, and time called.

Q. Do you hear the O-S-ing of trains?

A. They also give the arriving time and release time at Elmira.

Q. That is what is commonly known as an O-S report, is it not?

Mr. Davis: I object to that as calling for a conclusion.

The Court: Sustained.

Mr. Dwyer: Exception.

Q. Do you know whether or not that report to which you have last testified is commonly known in railroad practice as an O-S report?

Mr. Evans: Just yes or no.

A. Yes, it is, in my opinion.

Q. That is, you do know?

A. Yes.

Q. Now I will ask you, is it commonly known as an O-S report?

A. Yes.

Q. Do you hear the handling of train delay reports?

A. Yes.

[fol. 281] Q. By whom in Elmira do you hear those reports transmitted?

A. The Crew Clerks.

Q. And to whom do you hear those reports being made?

A. Going to Buffalo to the Dispatcher.

Q. Is there any other message work you hear the Crew Clerk in the Elmira Yard transmitting to any other point?

A. That is about all of it that I hear.

Q. Do you hear those reports being given by the Crew Clerks in the Elmira office frequently or infrequently?

A. Very frequent.

Q. Is it a day in or day out proposition, or does it happen once a week, or twice a week, or what?

A. Every day.

Mr. Dwyer: You may ask.

Cross-examination.

By Mr. Davis:

Q. You used to work for the Erie, didn't you, Mr. Orcutt?

A. Yes.

Q. Were you raised at Bath?

A. No.

Q. You used to work at Bath for the Erie?

A. Yes.

Q. Now you work at Bath for the Lackawanna?

A. Yes.

Q. Do you sell tickets?

A. Yes.

Q. Do you handle baggage?

A. Just check it.

Q. Do you handle some station correspondence?

A. Well, I make out reports.

Q. You make out reports that are transmitted by mail?

A. We send them by mail; we mail them out.

Q. You make up reports and they are sent to Buffalo by mail?

A. No, they go to Scranton.

[fol. 282] Q. Do you make out demurrage reports at Bath?

A. No, not at the ticket office.

Q. Do you sweep out the station up there, or do you have a helper?

A. I have a janitor, at the present time.

Q. Do you send detailed consists now to Buffalo for your trains?

A. After 6:30.

Q. What time are you?

A. 4:00 to 12:00.

Q. Then you are giving a detailed consist to Buffalo?

A. To East Buffalo.

Q. That is a detailed consist?

A. After 6:30.

Q. This consist you hear over the telephone is just so many loads and so many empties?

A. Yes.

Q. It does not take very long to give that, does it?

A. No, not very long.

Q. Just a couple of seconds, isn't that right?

A. According to how many they have.

Q. Did I understand you to say you heard the Crew Callers at Elmira calling crews?

A. No.

Q. You said that on your direct examination, that that was one of the things you heard him do when you were listening on the wire,—you heard him calling crews?

A. He would call them on the other 'phone.

Q. You did not mean that, did you?

A. He wouldn't be calling them on our 'phone.

Q. How long does it take to give the reach of a train,—about one second?

A. Maybe two.

Q. Two seconds?

A. Just about.

Q. About how long does it take for you to say the name of the Conductor, the name of the Engineer, the engine number, [fol. 283] ber, and the symbol of the train,—about five seconds?

A. Well, maybe 10 or 15. I do not think it would take over that.

Q. That is pretty generous, isn't it?

A. Yes.

Q. You could also get in some loads, and empties, and tonnage, in that 15 seconds, couldn't you?

A. You might.

Q. This detailed consist you now send from Bath, that was the detailed consist you sent from Elmira before, wasn't it?

A. Yes, sir.

Q. When you are listening in on the telephone you hear the Operator at the tower give the Dispatcher the arrival time,—doesn't he?

A. Yes, —.

Q. And the Operator at the station gives the Dispatcher the departure time, doesn't he?

A. I think he does; yes, sir.

Q. The Crew Clerk does not give the arrival time, does he?

A. He gives the arrival at the Yard, and the release time.

Q. That is, of the Crew?

A. Yes.

Q. And not of the train?

A. Not the train.

Q. And the Dispatcher uses the information which he gets from the tower as his O-S on the train, doesn't he?

A. I couldn't say.

A. You do not know?

A. No, sir.

Q. When you were working at the Elmira Yard, the information which you got there you gave to the Crew Caller, didn't you?

A. Yes, sir.

Q. And conversely, the information which you sent out you got from the Crew Caller, didn't you?

A. Yes, sir.

Q. The consist which you send in to East Buffalo now is the same consist you used to send out from Elmira when [fol. 284] you worked in Elmira?

A. Detailed consist, yes.

Q. The main consist?

A. Yes.

Mr. Davis: That is all.

By Mr. Dwyer:

Q. You also handled the other consists?

A. Yes, sir.

Mr. Dwyer: That is all.

Redirect Examination.

By Mr. Hassenauer:

Q. Mr. Davis brought in the time it takes to transmit messages over the telephone. Isn't it a fact you can transmit messages over the telegraph instruments in the position you occupy in several seconds also?

Mr. Davis: I object to that.

Mr. Hassenauer: He went into the time, how fast the message could be sent over the telephone. It can also be sent by telegraph.

The Court: Overruled.

Mr. Davis: Exception.

Q. Will you answer the question?

A. It would be all according to how long the message was.

Q. It can be transmitted in seconds rather than minutes?

A. Yes, sir.

Q. Of course it depends upon the length of the message?

A. Yes.

Mr. Davis: I object to it as leading.

The Court: Sustained.

Mr. Hassenauer: That is all—

[fol. 285] Redirect Examination.

By Mr. Dwyer:

Q. You also worked in the tower in Elmira in 1938, didn't you?

A. Yes.

Q. What did you do in the Elmira tower?

A. Just Leverman and Gateman.

Q. No message work at all?

A. No message work at all.

Mr. Dwyer: That is all.

Witness excused.

LEO W. ENGLE, duly sworn as a witness on behalf of the Defendant Slocum, testified as follows:

Direct Examination.

By Mr. Dwyer:

Q. What is your occupation, Mr. Engle?

A. Operator Clerk.

Q. On the D. L. & W.?

A. Yes.

Q. Where?

A. Dansville, N. Y.

Q. How long have you been employed at Dansville?

A. About 32½ years.

Q. As an Operator Clerk?

A. As an Operator Clerk.

Q. And you have worked on all shifts, have you?

A. I have.

Q. You are now engaged in the transmission of certain messages over the message and Dispatcher's line?

A. Yes, sir.

Q. What messages do you regularly handle as a matter of routine?

A. All the eastbound freight trains throw off their consists there.

[fol. 286] Q. What do you do with that consist?

A. We call the switchboard at Elmira and ask for Number Five, which are the Crew Clerks. We give these consists to the Crew Clerks.

Q. Is that the general consist or detailed consist?

A. That is the general consist they have for their trains for Elmira, Binghamton, Scranton, and through?

Q. What other messages do you handle?

A. We handle Western Union messages.

Q. That is wire?

A. Yes, sir. And we handle hot box reports.

Q. To whom are they given?

A. The Dispatcher. And we handle "No Bill" reports, and "Wrong Number of Waybills," which we 'phone to the Eastbound Desk at Buffalo.

Q. What train consists do you communicate to the Crew Clerks in Elmira?

A. Why, we give them the total number of cars for Elmira, and the tonnage, the same as Binghamton, Scranton, and through, and if there are "No Bills," and any "icing," or anything like that.

Q. On trains going east that occurs?

A. All eastbound freight trains.

Q. Do you receive messages from the Crew Clerks in Elmira?

A. No, sir; we do not.

Q. The "Hot Box" reports, you say, you send to the Dispatcher in Buffalo?

A. We do.

Q. Do you also send that to Elmira?

A. No, we do not.

Q. Do you hear those reports going over the wire to Elmira?

A. From other stations?

Q. Yes.

A. Hot box reports?

[fol. 287] Q. Yes.

A. No. They all go to Buffalo to the Train Dispatcher.

Q. Suppose an eastbound train is coming down away from Buffalo, what becomes of the hot box report down?

A. After they pass my station?

Q. Yes.

A. They throw them off at Bath or Corning; or wherever the train sets out this hot-box they generally notify the Dispatcher.

Q. Prior to 1938 what did you do with your assistants?

A. We sent them by mail to the Elmira Yard office.

Q. And since 1938 you send them over the 'phone to the Yard office also?

A. That is right,—to the Crew Clerks at the Yard office.

Q. Did you receive general instructions on that from the Superintendent's office?

A. We have.

Q. Then do you handle messages concerning what is termed "Wrong Numbers of Cars"?

A. "Wrong Numbers of Waybills of Cars"?

Q. Yes.

A. Yes, we do.

Q. Who do you inform about that on eastbound trains?

A. We call up the Eastbound Desk at East Buffalo.

Q. Do you call Elmira on it?

A. No.

Q. Does this information you give Elmira occur on all eastbound trains?

A. All eastbound freight trains.

Q. Do you transmit messages over both the Dispatcher's and the message line to Elmira?

A. Sometimes the message line is out of commission and we have the Dispatcher bring the Crew Clerks on the Dispatcher's 'phone, and we give it to them on the Dispatcher's line.

[fol. 288] Q. And at times when you go in on the message line do you find the line is busy?

A. Oh, yes, quite often.

Q. And do you hear the Elmira Yard office transmitting messages to other points?

A. I do.

Q. What messages do you regularly hear the Elmira Yard office transmitting?

A. Drill reports.

Q. What is a drill report?

A. The time of an inspection, cars set off, and on cripples, switching out various cars for Elmira.

Q. Who do you hear those messages being transmitted to?

A. To a Clerk in the Dispatcher's office, or sometimes the Chief Dispatcher.

Q. In Buffalo?

A. In Buffalo.

Q. Do you regularly and commonly hear the Elmira Yard office giving the information on many trains per day to Buffalo?

A. Yes, sir; that is right.

Q. Prior to 1938 who gave those drill reports, and so forth, to Buffalo from the Elmira Yard office?

A. The Operator at the Elmira Yard office.

Q. Do you recall ever having heard a Crew Clerk give any of this information to Buffalo, prior to 1938?

A. No, I have not.

Q. Have you ever heard the Elmira Yard office give a detailed consist to Buffalo?

A. Prior to 1938?

Q. Since 1938?

A. Since 1938?

Q. Yes.

A. Elmira Crew Clerks?

Q. Yes.

A. Yes, I have.

Q. Prior to 1938, who did you hear giving that information?

[fol. 289] A. The Telegraph Operators at the Elmira Yard office.

Q. Prior to 1938 do you know who handled the train orders and clearance cards out of Elmira?

A. Yes, I do.

Q. Who?

A. The Telegraph Operators.

Q. Do you know who handles them now?

A. The train orders?

Q. Yes.

A. The Towermen at the tower at Elmira.

Q. It is my understanding that all passenger trains and message work is handled out of the passenger station. Is that right?

A. That is right, at Elmira.

Q. And was prior to 1938?

A. That is right.

Mr. Dwyer: You may ask.

Cross-examination.

By Mr. Davis:

Q. Mr. Engle, do I understand you to say that since 1938 you have heard a Crew Clerk at the Elmira Yard office give a detailed consist, car by car, to Buffalo?

A. Car by car?

Q. Yes.

A. No, I have not, because they throw off that consist at Bath.

Q. Then the consist you are speaking of is a consist showing loads, number of loads, tonnage, engine number, Conductor and Fireman, is that right?

A. The one they throw off at Dansville?

Q. No, the ones you have heard the Crew Clerks giving Buffalo?

A. They give the crews, and the time they are called, the time they are on duty, and all that stuff.

Q. The time they are on duty?

A. Yes.

Q. What else do they give now?

A. On west-bound trains?

[fol. 290] Q. Yes.

A. Loads and empties.

Q. That does not take very long, does it?

A. It takes some time sometimes.

Q. They do not detail the cars in the train, do they?

A. Not the Crew Clerks, no.

Q. When you get the wrong number on a way bill, I believe you said you reported that to the Eastbound Desk at Buffalo?

A. That is right.

Q. You report that to a Clerk, don't you?

A. Yes, I do.

Q. Elmira is not a regular icing station any more, is it?

A. Not any more.

Q. It is an emergency icing station?

A. I don't know.

Q. Most of your work is done with an Operator at Buffalo, or do you do quite a bit of work with the Clerks up there?

A. East Buffalo?

Q. Yes, East Buffalo?

A. My work is done with the Eastbound Train Desk at East Buffalo. It is a clerk.

Q. What other duties do you have at Dansville? Do you sell tickets?

A. Yes.

Q. What trick are you on?

A. 12:00 to 8:00.

Q. 12:00 noon to 8:00.

A. 12:00 midnight to 8:00 in the morning.

Q. Do you sell tickets?

A. I do.

Q. Do you answer station correspondence, write letters?

A. If it concerns me, I do, but the Agent generally takes care of that.

Q. Do you make out reports that are sent in by mail?

A. I do.

Q. Do you make out any demurrage reports?

A. Not on the third trick I don't. When I worked on the day trick I did.

[fol. 291]. Q. And a goodly portion of your work is of a clerical nature, isn't it,—writing?

A. It is about fifty-fifty.

Mr. Davis: I think that is all; thank you.

Redirect examination.

By Mr. Dwyer:

Q. Prior to 1938, Mr. Engle, who was the bulk of your work with East Buffalo done with, a Clerk or an operator?

A. We never had much of that stuff with East Buffalo: the "No Way-bills," and all that, until just within the past three or four years. I think it was since the war.

Mr. Dwyer: That is all!

Witness excused.

CLAUDE B. THOMPSON, duly sworn as a witness on behalf of the Defendant Slocum, testified as follows:

Direct examination.

By Mr. Dwyer:

Q. What is your occupation, Mr. Thompson?

A. Operator Clerk.

Q. Where?

A. At Dansville.

Q. How long have you been employed at Dansville?

A. Why, for approximately 15 years, I would say.

Q. As an Operator Clerk all that time?

A. That is right.

Q. What trick do you work?

A. 4:00 to midnight, second trick.

Q. Do you, as a matter of common practice, handle certain message work concerning the operation of trains through [fol. 292] and out of Dansville?

A. Yes, sir.

Q. And handling message work concerning an eastbound train, with whom do you come in contact?

A. The usual procedure is: the general report is given to the Train Dispatcher in Buffalo, and the time they pass the station, and the general consist of it is transmitted to the Dispatcher in Buffalo; after that the "Balance Report," by which I mean Elmira cars, Ringhamton cars, and through and tonnage, are given to the Crew Clerk at Elmira.

Q. Prior to 1938 did you handle that same type of work?

A. I have at points where I have worked, yes.

Q. And did you communicate with the Elmira Yard office concerning those messages?

A. I have.

Q. Prior to 1938 with whom did you communicate?

A. With the Telegraph Operator at the Yard office.

Q. And that message work which you handled with the Elmira Yard office is handled in connection with every eastbound train going through Dansville, is that right?

A. Yes, every eastbound freight train.

Q. Do you also handle O S reports?

A. Yes, sir.

Q. To whom are they communicated?

A. The O S is given to the Train Dispatcher.

Q. Have you heard them being communicated eastward?

A. Yes.

Q. Are there other communications you transmit eastward concerning eastbound trains?

[fol. 293] A. No, that covers it generally, outside of the fact oftentimes when supplies might be needed for the outgoing crew that are not included in the caboose, that is usually transmitted to the Crew Clerk at Elmira, such as T-16, which is the report that Conductors keep. And also if any caboose is short of any equipment such as lanterns, or flags, or squeegees, or torpedos, things of that character.

Q. That is usually given to the Crew Clerk at Elmira?

A. That is usually given to the Crew Clerk along with the consist; yes, sir.

Q. When you have been on the wire waiting to transmit a communication, have you heard messages being taken by and from the Elmira Yard office?

A. Yes.

Q. Have you heard the Elmira Yard office in contact with the Dispatcher in Buffalo?

A. I have.

Q. What do you commonly hear being transmitted between the two points?

A. Why, with the Dispatcher in Buffalo it is usually the crew to take the train in either direction from Elmira.

Q. That is what is known as the "Reach"?

A. No; that is just the crew on the taking train.

Q. The personnel?

A. The personnel, yes; the time they are on duty, and the time they are called; also the consist, so many loads and so many empties, and so on; and the total tonnage.

Q. Do you also hear the Dispatcher communicating reaches to the Clerk in Elmira?

A. I have.

Q. Have you also heard any delay reports, and things of that kind, being transmitted?

A. Yes.

[fol. 294] Q. By whom to whom?

A. Usually the Crew Dispatcher to the Train Dispatcher.

Q. The Crew Clerk?

A. Yes.

Mr. Davis: You said the "Crew Dispatcher," didn't you?

The Witness: I should have said "Crew Clerk."

Q. That is a matter of common routine, isn't it?

A. Yes.

Q. Prior to 1938 did you hear the same messages transmitted to and from Elmira?

A. Yes; the Operators usually handled that detail.

Mr. Dwyer: That is all.

Cross-examination.

By Mr. Davis:

Q. Prior to 1938 did you ever call up the Crew Clerks in the Elmira Yard office?

A. No, sir.

Q. Never?

A. Never.

Q. You work from 4.00 P. M. to midnight, is that right?

A. That is right.

Q. Do you sell tickets?

A. I do.

Q. Do you make out reports?

A. No.

Q. That is not on your trick?

A. That is not on my trick, no.

Q. Do you ever answer any station correspondence?

A. Never other than concerning myself.

Q. Do you make out demurrage reports?

A. No.

Q. When you telephone the Crew Clerks at Elmira, just exactly what do you say to them?

A. We get the exchange operator in Elmira, and get the number of the Crew Clerk and tell him we have an east-bound or several east-bound trains to report. The engine [fol. 295] number is given, and the time they pass our station, the total number of cars for the various points, such as Elmira, and the tonnage; Binghamton, and the tonnage; D. & H., and the tonnage; Scranton, O. & W., and Port Morris, and through, with total tonnage through. Then the total number of the cars and the total tonnage. That is all.

Q. It wouldn't take any longer to say that over the telephone than it has taken you now?

A. What is that?

Q. It would not take any longer to tell it to the Crew Clerk than you are taking now?

A. It depends on the consist. Sometimes they are quite lengthy.

Q. All you say is: "29 cars for Elmira," for instance,— isn't that right?

A. Yes.

Q. "29 cars for Elmira?"

A. Yes.

Q. The transmission of this information to Elmira has nothing to do with Dispatcher's work, does it?

A. With Dispatcher's work, no.

Q. The Dispatcher has this information, or hasn't he?

A. He has the general information; yes, sir.

Q. Isn't it true that the information which you telephone to the Elmira Crew Clerks takes such little time that you could give that to the Operator at the Tower?

A. It could be done, yes.

Mr. Davis: That is all.

Redirect examination.

By Mr. Dwyer:

Q. It never has been handled by the tower, has it?

A. Only on occasions when the telephone lines might be all out; then it was sent by wire to the Operator at the Elmira tower.

[fol. 296] Q. Is the difference in time of transmission by the Morse wire and transmission by telephone very much?

A. It is approximately the same.

Q. And how many set-off points are there between Dansville and Hoboken?

A. It is pretty hard to say how many there might be, local setoff points on the Buffalo Division. They sometimes have cars for Painted Post, for Bath, and sometimes other local cars; there are the usual setoff points at Elmira; and the same applies to east of Elmira: Waverly, Owego, together with the Binghamton cars, the cars going to the D. & H., and so on.

Q. How far do you report the set-offs?

A. Usually just between Dansville and Binghamton. That usually gives the information for the Elmira Yards, as for the setoff of local cars east of Elmira.

Q. There are also setoffs for Dansville, are there not?

A. Not very often on through trains.

Q. Sometimes?

A. Not very often.

Q. You also report the setoff on locals?

A. Yes.

Q. These are setoffs on local trains?

A. Yes.

Q. When you report the consists do you report setoffs at all points between Dansville and Binghamton?

A. As a general rule, yes; if they have cars for Waverly, sometimes, providing it is rush cars; or they will make it "Elmira on way" when the commodity is not perishable.

Q. In other words, when you report a consist you do not just call up and say "So many cars, Elmira, so many [fol. 297] cars, loads; so many cars, empties;" but you give the cars, the empties, the loads, and the tonnage, and everything vital to the movement of the train?

A. As I said before, that might be done, depending upon the commodity, if it was rush; if it was a car for Oswego or Waverly and it is not rush, it will be "Elmira on way."

Q. That is made up from Dansville?

A. It is made up from Elmira.

Mr. Dwyer: That is all.

Witness excused.

EARLE P. KNICKERBOCKER, duly sworn as a witness on behalf of the Defendant Slocum, testified as follows:

Direct examination.

By Mr. Dwyer:

Q. You are employed by the D. L. & W.?

A. Yes, sir.

Q. In what capacity?

A. Agent Operator.

Q. Where?

A. Oswego, N. Y.

Q. How long have you been employed there?

A. Steady since June 15, 1916.

Q. Is it part of your duties to receive and transmit certain messages concerning train operations?

A. It is.

Q. And it was prior to 1938?

A. Yes.

Q. Prior to 1938 with whom did you communicate such messages in the Elmira Yard?

A. With the Telegraph Operator.

Q. In the Yard office?

A. Yes, sir.

Q. Since 1938 with whom have you transmitted those messages?

A. With the Clerks in the Yard.

[fol. 298] Q. While you have been operating, or waiting to communicate messages, have you been on the wire awaiting your turn?

A. I have.

Q. Have you heard communications from the Elmira Yard office to other points?

A. I have.

Q. Did you know who was communicating the messages in the Elmira Yard, either taking or sending them?

A. It was the Crew Clerk, I could tell him by his voice.

Q. Prior to 1938 do you know who handled that work in the Elmira Yard Office?

A. Telegraph Operator.

Q. And the specific communications work referred to by the previous witnesses are the same communications work which you refer to now, is that correct?

A. Practically the same, yes.

Mr. Dwyer: You may ask.

Cross-examination.

By Mr. Davis:

Q. When you speak of messages, you do not mean a train order, do you?

A. In what way do you mean?

Q. Mr. Dwyer asked you if you heard messages going over the wires from the Crew Clerks at Elmira.

A. Not train orders, no.

Q. It is just information?

A. Yes.

Q. That is not a message in the sense of a telegram or order?

A. No.

Q. It is just information?

A. Yes.

Q. At the present time you are Agent Operator at Owego, is that right?

A. Yes.

Q. How long have you been an Agent Operator?

A. Since December 1, 1942.

[fol. 299] Q. Do you bill freight?

A. No. Our station there is divided; there is a freight station and a passenger station.

Q. Do you make out the expense bills?

A. No; that is done by the Clerks at the freight office.

Q. You sell tickets, don't you?

A. Yes, sir.

Q. Do you answer station correspondence?

A. Yes, sir.

Q. Do you have to clean out the station in Owego, or do you have a janitor?

A. No, that is divided up; the Clerk in the freight house helps and the Operators.

Q. And you sometimes help?

A. Sometimes, yes.

Q. What other duties do you have as Agent Operator at Owego?

A. Well, the duties of an Agent Operator are numerous.

Q. Do you go out and solicit business?

A. You do that, yes. And you have to keep the public good natured in these times, and answer correspondence, and sell tickets. You are responsible practically for the general run of the business.

Mr. Davis: I think that is all.

(Witness excused.)

WILLIAM GEE, duly sworn as a witness on behalf of the Defendant Slocum, testified as follows:

Direct examination.

By Mr. Dwyer:

Q. What is your occupation, Mr. Gee?

A. I am Telegraph Operator at the Binghamton passenger station.

[fol. 300] Q. How long have you been employed by the D. L. & W.?

A. I entered the service in November, 1917.

Q. How long have you been employed on this Division?

A. Virtually since I re-entered the service.

Q. Was there a time you were employed at the B. V. tower?

A. Yes, but that is on our same Division.

Q. Prior to 1938 did you regularly, in the course of your job, work with the Operators at the Elmira Yard office?

A. Yes. When I was working in the office during my entry into the service we transmitted the westbound consists to Elmira by telegraph.

Q. Did you receive information from the Operators at the Elmira Yard office?

A. Yes; they gave us the consists on eastbound trains.

Q. Were there other communications between the Operators at Elmira and your office?

A. If we had any messages for the Yardmaster, we transmitted them over the wire.

Q. Have you had occasion to communicate with the Elmira Yard office regularly since 1938?

A. Yes; we communicate by giving the usual business of consists on westbound trains.

Q. With whom do you communicate in the Elmira Yard office now?

A. We get the Crew Clerks on our telephone line No. 5 at Elmira.

Q. And you give this information to them?

A. Yes.

Q. Did you prior to 1938 handle train orders?

A. Yes; I have always handled train orders.

[fol. 301] Q. And they were communicated to the train?

A. The train orders were between the train and the Train Dispatcher.

Q. With whom do you now communicate the train orders?

A. All train orders regarding the movement of trains come through the Train Dispatcher.

Q. Do you send to the tower on them now?

A. You are referring to the train orders regarding the movement of trains.

Q. Yes. Do they come eastward?

A. The train orders, you understand, are handled by the Dispatcher to the Operator as to the movement of the trains.

orders as to running late, or meeting point, or similar to that.

Q. You do not communicate with the tower in Elmira?

A. No, just to the Yard office.

Q. The Crew Clerk?

A. Yes.

Q. The communications you handle with the Crew Clerk now are communications that prior to 1938 you handled with the Yard Operator?

A. Yes.

Mr. Dwyer: You may ask.

Cross-examination.

By Mr. Davis:

Q. Did I understand you were at the B. Y. tower when you had these communications?

A. No. They were in the telegraph office exclusively, upstairs in the depot.

Q. This consist you give is not the detailed consist, is it?

A. For the last month or so they have required more of a detailed consist, inasmuch as we have to notify the Yard of any dropped cars for points west of Elmira.

[fol. 302] Q. But usually it has been the engine number, and number of loads, and number of empties, is that right?

A. Usually, yes.

Q. How long does it take you to give that information?

A. Well, it varies. We find the most difficult thing is getting the office on the 'phone.

Q. To actually give the information over the 'phone, it takes just a few seconds?

A. For one consist it doesn't take long, maybe three or four minutes.

Q. Three or four minutes?

A. I should think so, yes, by the time he writes it down.

Q. Did you ever work any place else besides the B. Y. tower?

A. Yes; in my previous employment with the D. L. & W. I worked at various stations.

Q. What was your work at those stations?

A. I was formerly an Agent at Lisle, and I was a Clerk in the Scranton office, and I was a Clerk in the round house. I had various experiences.

Q. When you were Agent at Lisle you did station correspondence, didn't you?

A. Yes, I did everything.

Q. Did you clean out the station?

A. Oh yes, and washed the windows.

Q. Did you bill freight?

A. Yes.

Q. Did you make out expense bills?

A. Yes.

Q. Did you send in car demurrage reports?

A. Yes.

Q. In fact, the greater portion of your work was making out reports and selling tickets, wasn't it?

A. That constituted more of the time than anything else, I presume.

Mr. Davis: That is all.

(Witness excused.)

[fo] 303] RODERICK A. BEACH, duly sworn as a witness on behalf of the Defendant Slocum, testified as follows:

Direct examination.

By Mr. Dwyer:

Q. You are employed by the D. L. & W., Mr. Beach?

A. That is right.

Q. What is the nature of your employment?

A. At present I am Clerk Operator.

Q. At Owego?

A. At Owego, third trick.

Q. How long have you been there?

A. About three years.

Q. There was a time you worked relief shifts at the Elmira Yard office as an Operator?

A. I worked there one night as relief is all.

Q. You have been on the Buffalo Division right along, have you, for how long?

A. Since October, 1918.

Q. Prior to 1918 you were familiar with the communications handled by various points with the Elmira Yard office, were you?

A. That is right.

Q. You worked in the office as Operator yourself at one time?

A. One night; yes, sir.

Q. You now communicate with the office, do you?

A. Regularly.

Q. Do you also hear other points communicating with the Elmira Yard office while you are on the wire?

A. I do.

Q. Aside from train orders, Mr. Beach, are communications formerly handled by Operators in the Elmira Yard office now handled by the Crew Clerks in the Elmira office, both transmission and receipt?

A. Is that at the present time?

[fol. 304] Q. Yes.

A. At the present time outside of train orders this work is carried on with the Crew Clerks in Elmira.

Q. That has been generally since 1938, is that correct?

A. Well, my actual working with them—I have actually worked with them possibly the three years, but prior to that I have heard work being transmitted by them. I have not done it myself but I have heard others doing it.

Mr. Dwyer: You may ask.

Cross examination.

By Mr. Davis:

Q. You never sent any telegrams to the Crew Clerks, did you?

A. Well, —

Q. Directly on the telephone?

A. No.

Q. The telegrams go to the Operators in the ticket station, don't they?

A. If it was pertaining to the ticket work or anything of that line, they were given to him. There have been messages, I would say, given to the Crew Clerk that possibly should have been done by telegraph.

Q. What message?

A. Cars to be handled carefully. Very frequently the trains have Diesel engines in them for another railroad that are to be handled especially carefully. Messages have been given to the Crew Clerk at Elmira Yard.

Q. By you?

A. Yes, sir.

Q. Where did you get the message from?

A. The train crew threw out the consists and the information was on the consist.

Q. That was for the switching at the Elmira Yard, wasn't it?

A. That was for the general information of the crews handling the train, that speed was not to exceed 25 or 30 [fol. 305] miles an hour, in regards to the equipment being new equipment or reconditioned equipment.

Q. Why didn't you send that message to the Operator at the passenger station?

A. The general reason is that the stuff is all handled with the Crew Clerk.

Q. Didn't you receive specific instructions that all messages were to be handled through the Operator at the ticket office?

A. No, sir; I never received any such instructions as that.

Q. You never saw the general bulletin on that?

A. I did not; I am sorry to say.

Q. At Owego you work the third trick?

A. That is right.

Q. Do you sell tickets?

A. That is right; yes, sir.

Q. Do you write some letters?

A. No.

Q. Do you make out any reports?

A. I make out ticket reports.

Q. That is sent by the mails, isn't it?

A. Mr. Knickerbocker mails the reports out. I don't know. I make the reports out and they are left on his desk. I presume they are sent by mail. They usually are.

Q. And when you converse with the Crew Clerks at Elmira you give them the number of loads, and the number of empties?

A. And the setoff cars west of Elmira, contents and destination for cars west of Elmira.

Q. That are not going through to Buffalo?

A. That is right. The setoff, and the destination of the setoff cars, whether Bath, Dansville, Mount Morris, and what they contain.

Mr. Davis: That is all.

(Witness excused.)

[fol. 306] LAWRENCE E. POPECK, duly sworn as a witness on behalf of the Defendant Slocum, testified as follows:

Direct Examination.

By Mr. Dwyer:

Q. What is your occupation?

A. Operator for the Lackawanna Railroad.

Q. Where?

A. At present I have a temporary vacancy at Elmira tower.

Q. You are filling a temporary vacancy?

A. That is right.

Q. Have you also worked in the Elmira ticket office?

A. Yes, sir.

Q. At the Elmira Yard office?

A. No, I have never worked in the Yard office.

Q. Did you work in the ticket office prior to 1938?

A. No, sir.

Q. Did you work in the tower prior to 1938?

A. No, sir.

Q. What communications do you, as an Operator in the ticket office, handle respecting the movement of freight trains?

A. When I worked at Elmira ticket office we handled a good many messages that were sent from various outlying points, like Scranton and Buffalo, to the Yardmaster, also to the ticket agent, and to the Roadmaster.

Q. Did you handle routine reports, such as consists, drill reports, and so forth?

A. No, we did not handle consists. We handled drill reports.

Q. Where did you get the drill reports from that you sent?

A. The drill reports were brought down from the Yard office by messenger.

[fol. 307] Q. Is that being done now, do you know?

A. No, I think that was discontinued.

Mr. Davis: I ask the answer be stricken out, as to what he thinks.

The Court: Strike it out.

A. (Continuing:) In fact, it was discontinued while I was working at the ticket office.

Q. Did you have O-S-es on freight trains?

A. Yes.

Q. Where did you get them from?

A. An O-S is a report of the train by station. As the trains went by the station we would report them to the Dispatcher. That is O-S'ing the train.

Q. Have you worked in the tower since 1938?

A. Yes, sir.

Q. What communications work have you handled in the tower?

A. We handle train orders, we O-S trains to the Dispatcher, and at various times we have received reaches.

Q. You do not receive them regularly?

A. No.

Q. Did you receive them in the ticket office while you were employed there?

A. No, sir.

Q. Do you know who is handling the drills now in the Elmira Yard?

A. Yes, sir.

Q. Who?

A. The Crew Clerk.

Q. In the Yard office?

A. In the Yard office.

Q. Did you, while you were employed in the tower as an Operator, convey to the Dispatcher in Buffalo any information concerning the crew, symbol numbers, and what not, of trains passing through Elmira?

A. No, sir.

Q. While you have been on the wire waiting to transmit [fol. 308] some communication have you heard the Crew Clerks in the Elmira Yard office communicating with other points?

A. Quite frequently, yes, sir.

Q. Do you hear them communicating various messages and receiving various communications concerning train operations?

A. Not messages, I wouldn't say.

Q. Am I wrong when I say "message"? You communicate a message. Everything is a "message" in my language.

Mr. Davis: Let us find out what Mr. Popeck means by a "message."

Q. What do you mean by a "message"?

A. As an Operator, we consider a "message" as a written message to a certain party, containing certain information, and a signature.

Q. You do not consider routine train work as message work?

A. No, sir.

Q. Such as consists, drill reports, and things of that kind?

A. No; they go by their own name. A regular message is what an Operator looks at as I have stated.

Q. I am sorry I have misled the witnesses. A "message" in my language is any communication. You do not consider a message as a routine communication?

A. That is right.

Q. Have you heard the Clerks in the Elmira Yard office handling communications such as you have just referred to concerning the movement of trains in and out of the Elmira Yards?

A. Yes, quite frequently.

Q. With whom have you heard them communicate?

A. With the Train Dispatcher in Buffalo.

[fol. 309] Q. Have you heard them receiving communications of that type?

A. Yes.

Q. From whom?

A. The Train Dispatcher in Buffalo.

Q. Have you heard them receiving them from other points also?

A. No, because the only line we have in the tower is the Dispatcher's 'phone; we do not have the regular line in there; we only have the local line to the Operator.

Q. So any communications transmitted over the regular message 'phone, you don't know anything about?

A. No.

Mr. Davis: Let us call it the commercial 'phone instead of the regular message 'phone.

Mr. Dwyer: I will call it anything.

Q. These communications you have heard over the message 'phone, you have heard them regularly?

A. Yes, sir.

Mr. Dwyer: That is all.

Cross examination.

By Mr. Davis:

Q. You operate the gate, don't you, from the tower where you now work?

A. Yes, sir.

Q. Do you consider that Operator's work?

A. It seems to be foisted on us as Operator's work; yes, sir. In fact, we are handling a three man job there at the tower.

Q. Most of your communications are direct with the Dispatcher, are they not?

A. Yes, sir.

Q. In fact, all of your communications are with the Dispatcher?

A. All of what communications?

Q. Are all of the communications you receive there from the Dispatcher?

A. In the line of train work, yes.

[fol. 310] Q. Do Clerks in Elmira or some other point call you up from some other point on occasion?

A. Very frequently.

Q. And you give them information as to trains?

A. Yes, sir.

Q. Do you call up Clerks at Elmira and other points to get information from them?

A. Yes, sir.

Q. Very frequently?

A. Yes, sir.

Q. And when you were working at the ticket office you sold tickets, didn't you?

A. Yes, sir.

Q. What trick did you work down there?

A. All the tricks, as an extra man.

Q. During the day trick the main part of your duty was selling tickets, wasn't it?

A. That was part of the duties.

Q. The main part?

A. I would not call it the main part. It was part of the duties.

Q. You answered the commercial phone?

A. Yes.

Q. And made reservations for Pullman reservations?

A. Yes.

Q. And advised people of the cost of a ticket from Elmira to a certain point?

A. Yes.

Q. And you looked up the rates on tickets?

A. Oh yes, all that work.

Mr. Davis: That is all.

Redirect examination.

By Mr. Dwyer:

Q. Can you say that you now handle more communications with Clerks than you do with Operators?

A. Yes, sir.

Q. And that did not use to be, did it?

A. It did not.

Mr. Dwyer: That is all.

[fol. 311] Recross-examination.

By Mr. Davis:

Q. About how much time do you think you spent on the wires when you were working in the ticket office, Mr. Popeck?

A. At what time do you mean, years ago or at present?

Q. How long have you been out of the ticket office? Not very long, have you?

A. One year.

Q. How much time during the day trick would you spend working the telegraph office or talking on the commercial wire between Elmira and some other point?

A. When I first worked in the ticket office we spent sometimes as much as an hour and a half working one wire. We would get a mass of messages—I mean by that as we Operators look at “messages”—from Scranton to Buffalo. Sometimes we had ten or fifteen at a time, or sometimes more.

Q. Back in 1940 how long did you spend?

A. That is when I refer to, between 1938 and 1940.

Q. About an hour and a half?

A. Yes.

Mr. Davis: That is all.

Redirect examination.

By Mr. Dwyer:

Q. That was just one batch of messages?

A. Yes, one batch. Sometimes that would be 20 minutes, and sometimes longer.

Q. And other things would occur then?

A. Other interruptions, such as people at the window, and reporting trains, and so on.

Mr. Dwyer: That is all.

Recross-examination.

By Mr. Davis:

Q. But the Clerks at the present time give you messages that have to be handled with the Dispatcher?

[fol. 312] A. In my present capacity as a Towerman?

Q. Yes.

A. No, they do not.

Q. When you were at the station, did they?

A. Yes. The Yardmaster would frequently give us messages. In the most part they would be brought from the Yard office by messengers.

Q. Sometimes the Clerks up there would telephone messages?

A. Yes; rush messages.

Mr. Davis: That is all.

Redirect examination.

By Mr. Dwyer:

Q. That no longer occurs?

A. That no longer occurs.

Mr. Dwyer: That is all.

Recross-examination.

By Mr. Davis:

Q. That is because you are now in the tower, isn't it?

A. Yes.

Mr. Davis: That is all.

(Witness excused.).

Mr. Dwyer: I would like to offer in evidence three letters: One dated October 16, 1942, from Mr. Elliott to Mr. Moffatt.

Mr. Davis: I object to the introduction of these letters. It is very apparent Mr. Elliott is not going to be called as a witness in this case and subjected to cross examination. The statements in the letters are self-serving declarations. I can't see where they are competent in any respect.

Mr. Dwyer: It is the same period for which the previous correspondence was offered, to show this dispute was in continuous progress, and the position the Telegraphers [fol. 313] took in relation to it, not as proof of the facts stated in the letters.

Mr. Davis: I will concede, for the purposes of the record, that the Railroad did receive a letter from Mr. Elliott, dated December 16, 1942, containing a protest as to conditions at the Elmira Yard office. I think that is sufficient.

The Court: Objection overruled. We will receive it, but not as proof of the facts stated.

Mr. Davis: Exception.

(Letter dated October 16, 1942, Mr. Elliott to Mr. Moffatt, received and marked: Defendant's Exhibit J.)

Mr. Dwyer: I also offer in evidence letter directed to Mr. E. B. Moffatt from J. L. Elliott, dated November 23, 1942, on the same theory.

Mr. Davis: Some objection.

The Court: Same ruling.

Mr. Davis: Exception.

(Letter dated November 23, 1942, from J. L. Elliott to E. B. Moffatt, received and marked: Defendant's Exhibit K.)

Mr. Dwyer: I now offer in evidence a letter directed to Mr. E. B. Moffatt, signed by J. L. Elliott, dated December 21, 1942, on the same theory.

Mr. Davis: Same objection.

The Court: Same ruling.

Mr. Davis: Exception.

[fol. 314] (Letter dated December 21, 1942, J. L. Elliott to E. B. Moffatt, received and marked: Defendant's Exhibit L.)

Mr. Dwyer: Now off the record, right at this point before I forget it,—there are various notations made on all

correspondence that has been introduced in evidence. Shall we stipulate that any notation on any correspondence submitted by anybody shall not be considered as part of the exhibit?

Mr. Davis: That is right: the only thing we are offering is the contents of the exhibit, without the notations.

Mr. Dwyer: We rest, your Honor.

Mr. McEwen: The Defendant Carlo desires to introduce no testimony.

(Evidence closed.)

MOTIONS

Mr. Dwyer: I renew the motion made at the close of plaintiff's case, on the same grounds, and upon the further grounds that it now appears on all the evidence thus far adduced that there is in existence^e between the plaintiff and the two defendants, a jurisdictional dispute as to into which category or class of service certain operations now being performed in the Elmira Yard office fall, and that is a type of dispute specifically referred to in the two United States Supreme Court cases previously submitted to your Honor. And further, upon the theory that plaintiff has failed to establish the cause of action set forth in the com-[fol. 315] plaint by a preponderance of the evidence, particularly in that the plaintiff has failed to establish any authority on the part of the deceased Mr. Voss to deal with a revision of the contract between the parties, or a waiver of any of the rights under the contract between the parties; and that the plaintiff has failed to show that the contract of 1940, entered into between the parties, contemplated anything other than is specifically set forth in the Rules of the contract, and has failed to show that the attaching of a Rate Schedule to the contract waived anything which they were entitled to under the Scope Rule and the other rules of the contract; and that a finding to the contrary would be contrary to the weight of the evidence thus far adduced.

Mr. McEwen: The Defendant Carlo joins in that motion to the extent that it involves the question of the jurisdiction of this Court to pass upon a jurisdictional dispute between labor organizations, it being submitted such a dispute is not justifiable or in the power of this or any other Court to decide.

The Court: Decision reserved.

Mr. Dwyer: For the purpose of the record, in the event the motions are denied, we ask our exceptions be noted.

The Court: Yes.

Mr. Dwyer: Shall we stipulate we will substitute photo-static copies of the correspondence submitted as exhibits [fol. 316] in the case for the original exhibits, and that the original exhibits be returned to the parties from whose file they were produced? Is that right?

Mr. Davis: Yes; with the exception of the agreements and the book of rules.

(Briefs and proposed findings to be submitted within 30 days after minutes received.)

Decision

(Same Title)

This cause having regularly come on for trial before me without a jury at an adjourned Trial and Special Term of this Court on the 6th, 7th and 9th days of August, 1945 and the allegations and proofs of the respective parties having been heard and due deliberation having been had thereon and the Court having duly handed down an opinion in writing thereon on the 9th day of January, 1946 with a direction that proposed findings be submitted to the Court, I do hereby make the following findings of fact and conclusions of law:

Findings of Fact

1. That at all the times hereinafter mentioned the plaintiff was and still is a foreign railroad corporation duly organized, incorporated and existing under and by virtue of the laws of the Commonwealth of Pennsylvania and [fol. 317] operating a railroad through the States of New York, New Jersey and Pennsylvania; that plaintiff has duly complied with all the provisions of Section 210 of the General Corporation Law and obtained a certificate from the State of New York of authority to do business within said state; that plaintiff has duly complied with all the provisions of Section 181 of the Tax Law, paid the license tax imposed by said section on foreign corporations doing business in the State of New York and obtained a receipt therefor; that plaintiff has in all respects complied with the laws of the State of New York permitting foreign corporations to become lessees of real estate in

said state and to maintain actions in the courts of said state, and that plaintiff is a resident of the County of Chemung by reason of the fact that its line crosses said county and it has, at all the times hereinafter mentioned, maintained and still maintains within said county and within the City of Elmira certain railroad tracks, a passenger station commonly known and designated as "Elmira Passenger Station", a yard office commonly known and designated as "Elmira Yard 'MS'" and a tower commonly known and designated as "'LV' Tower".

2. That Marion J. Slocum is the General Chairman and principal officer of Lackawanna Division No. 30 of The Order of Railroad Telegraphers, which is an unincorporated association existing and constituted for the purpose of collective bargaining and of dealing with plaintiff concerning grievances, terms or conditions of employment of certain of plaintiff's employees.

3. That said Lackawanna Division No. 30 of The Order of Railroad Telegraphers, between January 1, 1929 and April 30, 1940, was recognized by plaintiff as the sole bargaining agent only for that certain class or group of employees employed by plaintiff in or who were qualified to hold those positions which were listed in an agreement between plaintiff and said Lackawanna Division No. 30 of The Order of Railroad Telegraphers, effective January 1, 1929, entitled "Rules and Rates of Pay for Telegraphers", a copy of which said agreement was annexed to the complaint herein, marked Exhibit A, and was received in evidence on the trial of this action as Exhibit 1, and is incorporated herein by reference thereto, there being listed therein and covered thereby the positions of three clerk-operators employed at Elmira Passenger Station, three operators employed in Elmira Yard "MS" and three tower-men employed in "LV" Tower.

4. That said agreement, Exhibit 1, was in full force and effect only between January 1, 1929 and April 30, 1940.

5. That said Lackawanna Division No. 30 of The Order of Railroad Telegraphers, in the negotiation and execution of said agreement effective January 1, 1929, Exhibit 1, and in its dealings with plaintiff involving the application and enforcement thereof between January 1, 1929 and April

[fol. 319] 30, 1940, acted by and through its General Chairman who was the principal officer thereof.

6. That said Lackawanna Division No. 30 of The Order of Railroad Telegraphers at all times subsequent to May 1, 1940, was and is recognized by plaintiff as the sole bargaining agent only for that certain class or group of employees employed by plaintiff in or who are qualified to hold those positions which are listed in an agreement between plaintiff and Lackawanna Division No. 30 of The Order of Railroad Telegraphers, effective May 1, 1940, entitled "Rules and Rates of Pay for Telegraphers", a copy of which said agreement was annexed to the complaint and marked Exhibit B and was received in evidence on the trial of this action as Exhibit 10, and is incorporated herein by reference thereto, there being listed therein and covered thereby the positions of three operator-towermen employed in "LV" Tower and three operator-clerks employed at Elmira Passenger Station.

7. That said agreement, Exhibit 10, effective May 1, 1940, superseded and cancelled said agreement effective January 1, 1929, Exhibit 1, and is and has been since May 1, 1940 in full force and effect.

8. That said Lackawanna Division No. 30 of The Order of Railroad Telegraphers, in the negotiation and execution of said agreement effective May 1, 1940, Exhibit 10, and in its dealings with plaintiff involving the application [fol. 320] and enforcement thereof on and subsequent to May 1, 1940, has acted and still acts by and through its General Chairman who is the principal officer thereof.

9. That said Lackawanna Division No. 30 of The Order of Railroad Telegraphers, by and through its General Chairman, represents and since May 1, 1940 has represented only those employees occupying or qualified to hold those positions which are listed in said agreement effective May 1, 1940, Exhibit 10.

10. That the positions covered by Exhibits 1 and 10 and the locations and rates of pay thereof are set forth in a schedule attached to each of said agreements and that the schedule so attached is a part of each of said agreements.

11. That Louis J. Carlo is the General Chairman and principal officer of System Board of Adjustment, Dela-

ware, Lackawanna and Western Railroad, of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, which is an unincorporated association existing and constituted for the purpose of collective bargaining and of dealing with plaintiff concerning grievances, terms or conditions of employment of certain of plaintiff's employees.

12. That said System Board of Adjustment, Delaware, Lackawanna and Western Railroad, of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, took over an agreement between plaintiff [fol. 321] and Association of Clerical Forces of the Lackawanna Railroad, effective October 1, 1934, entitled "Rules and Working Conditions for Clerical Forces", a copy of which said agreement was annexed to the complaint herein, marked Exhibit C, and received in evidence on the trial of this action as Exhibit 3, and is incorporated herein by reference thereto, and between October 12, 1937 and December 31, 1938, said System Board of Adjustment, Delaware, Lackawanna and Western Railroad, of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees was recognized by plaintiff as the sole bargaining agent only for that certain class or group of employees employed by plaintiff in or who were qualified to hold the positions described and set forth in said Exhibit 3, there being included therein and covered thereby the positions of crew-callers employed in Elmira Yard "MS".

13. That said agreement, Exhibit 3, was in full force and effect only between October 1, 1934 and December 31, 1938.

14. That said System Board of Adjustment, Delaware, Lackawanna and Western Railroad, of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, in its dealings with plaintiff involving the application and enforcement of said agreement effective October 1, 1934, Exhibit 3, between October 12, 1937 and December 31, 1938, acted by and through its [fol. 322] General Chairman who was the principal officer thereof.

15. That said System Board of Adjustment, Delaware, Lackawanna and Western Railroad, of Brotherhood of Rail-

way and Steamship Clerks, Freight Handlers, Express and Station Employees, at all times subsequent to January 1, 1939 was and is recognized by plaintiff as the sole bargaining agent only for that certain class or group of employees employed by plaintiff in or who were qualified to hold the positions described and set forth in an agreement between plaintiff and said System Board of Adjustment, Delaware, Lackawanna and Western Railroad, of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, dated January 31, 1939, effective January 1, 1939, a copy of which said agreement was annexed to the complaint herein, marked Exhibit D, and received in evidence on the trial of this action as Exhibit 6, and is incorporated herein by reference thereto, there being included therein and covered thereby the positions of crew-callers employed in Elmira Yard "MS".

16. That said agreement, Exhibit 6, effective January 1, 1939, superseded and cancelled said agreement effective October 1, 1934, Exhibit 3, and is and has been since January 1, 1939, in full force and effect.

17. That said System Board of Adjustment, Delaware, Lackawanna and Western Railroad, of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express [fol. 323] and Station Employees, in the negotiation and execution of said agreement, effective January 1, 1939, Exhibit 6, and in its dealings with plaintiff involving the application and enforcement thereof commencing January 1, 1939, has acted and still acts by and through its General Chairman who is the principal officer thereof.

18. That said System Board of Adjustment, Delaware, Lackawanna and Western Railroad, of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, by and through its General Chairman, represents only those employees occupying or qualified to hold said positions described and set forth in said agreement effective January 1, 1939, Exhibit 6.

19. That effective May 1, 1938, plaintiff, pursuant to the terms and conditions of said agreement effective January 1, 1929, Exhibit 1, and without protest by and with the express consent of said Lackawanna Division No. 30 of The Order of Railroad Telegraphers acting by and through its General Chairman, abolished the positions of the three

towermen at "LV" Tower and three operators at Elmira Yard "MS", created three positions of "operator-towerman" at "LV" Tower, and transferred the work of the three towermen's and three operators' positions thus abolished which was recognized by the plaintiff as telegrapher's work to the said three operator-towermen located [fol. 324] in said "LV" Tower and to the three clerk-operators located in Elmira passenger station, the positions of said three clerk-operators being listed in said Exhibit 1 and the work of said three operator-towermen being work recognized by plaintiff as telegrapher's work.

20. That the said change made on May 1, 1938 was made only after consultation with the General Chairman of the Telegraphers who consented thereto and acquiesced therein provided the three operator-towermen at "LV" Tower were given a certain rate of pay greater than the rate previously paid for the positions abolished at "LV" Tower, that the consent of said General Chairman to said change was conditioned and predicated on such increase of pay for said newly established positions and that said increase of pay was so given by the plaintiff to said newly created positions.

21. That at the time said change was made on May 1, 1938 all of the work formerly handled by said operators in the Elmira Yard office which was recognized by plaintiff as telegrapher's work such as the handling of messages by telegraph, train orders, clearance cards, etc., was transferred to the new positions of operator-towerman at "LV" Tower and to the clerk-operators at the Elmira passenger station and the telegraph instruments were taken out of the Elmira Yard office.

22. That the three crew-callers left in the Elmira Yard office have been assigned no work since May 1, 1938 which [fol. 325] is recognized by plaintiff as telegrapher's work or which comes within the provisions of either Exhibit 1 or Exhibit 10 and that the duties of said crew-callers are clerical in nature and are covered by Exhibit 3 and Exhibit 6.

23. That said crew-callers and the positions held by them and the work assigned to them by the plaintiff are within said agreements, Exhibit 3 and Exhibit 6, during their said respective periods of effectiveness and not within said agreements, Exhibit 1 and Exhibit 10, during their said respective periods of effectiveness.

24. That ⁶after extended negotiations between the plaintiff and the General Chairman and the General Committee of Lackawanna Division No. 30 of The Order of Railroad Telegraphers and the Vice President of The Order of Railroad Telegraphers as to what positions should be included and listed in Exhibit 10, the positions of the three operators at Elmira Yard "MS" and of the three towermen at "LV" Tower, abolished May 1, 1938, were by mutual agreement specifically eliminated from said agreement effective May 1, 1940, Exhibit 10, and the positions of three operator-towermen at "LV" Tower, created May 1, 1938, were by mutual agreement specifically included and listed in said agreement effective May 1, 1940, Exhibit 10.

25. That on June 4, 1942 said Lackawanna Division No. 30 of The Order of Railroad Telegraphers, acting by and [fol. 326] through its General Chairman requested plaintiff to take away from said crew-callers employed in said Elmira Yard "MS", whose positions are described and set forth in Exhibit 6, certain work of a clerical nature which the said crew-callers had been performing as their assigned duties at said yard office for several years and requested plaintiff to assign said work, which was of a clerical nature, to men on the telegraphers' extra-list and to pay three men on said telegraphers' extra-list who did no work themselves for said work of a clerical nature assigned to and performed by said crew-callers from and retroactively to May 1, 1938.

26. That said System Board of Adjustment, Delaware, Lackawanna and Western Railroad, of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, acting by and through its General Chairman, maintained between October 12, 1937 and December 31, 1938 and that all work assigned to said crew-callers was work of a clerical nature described and set forth in said agreement, Exhibit 3, and has since January 1, 1939 maintained and still maintains that all work assigned to said crew-callers is work of a clerical nature described and set forth in said agreement, Exhibit 6.

27. That said Lackawanna Division No. 30 of The Order of Railroad Telegraphers, acting by and through its General Chairman, has, since June 4, 1942, maintained and still maintains that said certain work assigned to said crew-callers comes within said agreement effective May 1, 1940,

[fol. 327] Exhibit 10, and can only be assigned to and performed by employees covered by that agreement, and that three men on the telegraphers' extra-list, who did no work themselves, should be paid under said agreement, Exhibit 10, for said work assigned to said crew-callers retroactively to May 1, 1938.

28. That a dispute exists between the plaintiff and said Lackawanna Division No. 30 of The Order of Railroad Telegraphers and the Members and General Chairman thereof and said System Board of Adjustment, Delaware, Lackawanna and Western Railroad, of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and the Members and General Chairman thereof as to whether said work assigned to said crew-callers comes within the said agreement, Exhibit 10, or within the said agreement, Exhibit 6, said Lackawanna Division No. 30 of The Order of Railroad Telegraphers maintaining such work comes within said agreement, Exhibit 10, and said System Board of Adjustment, Delaware, Lackawanna and Western Railroad, of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees maintaining that such work comes within its agreement, Exhibit 6.

29. That the plaintiff has at all times denied the validity of said claim of said Lackawanna Division No. 30 of The Order of Railroad Telegraphers and in its dealings with the defendants, their predecessors in office and their said associations and the members thereof, has taken the position [fol. 328] that all such work assigned to said crew-callers between October 1, 1934 and December 31, 1938 came within said agreement, Exhibit 3, that all such work assigned to said crew-callers subsequent to January 1, 1939 and now assigned to them comes within said agreement, Exhibit 6, and that at no time have said crew-callers been assigned or required by the plaintiff as a part of their regular work or habitually allowed to handle any work which came within either of said agreements, Exhibit 1 or Exhibit 10.

30. That all such work assigned to said crew-callers between October 1, 1934 and December 31, 1939 came within said agreement, Exhibit 3, and that all such work assigned to said crew-callers subsequent to January 1, 1939 and all such work now assigned to them comes within said agreement,

Exhibit 6, and that at no time have said crew callers been assigned or required by plaintiff as a part of their regular work or habitually allowed to handle any work which came within either of said agreements, Exhibit 1 or Exhibit 10.

31. That on December 4, 1939 the General Chairman of said Lackawanna Division No. 30 of The Order of Railroad Telegraphers agreed with the plaintiff that the arrangement then in existence and still in existence in respect to the positions of the three crew-callers in said Elmira yard and the said work assigned to them should be continued until such time as the Thurston Street grade crossing elimination [fol. 329] project was completed and that said Thurston Street grade crossing elimination project has not yet been completed.

32. That said Lackawanna Division No. 30 of The Order of Railroad Telegraphers and its General Chairman at the time said change was made in respect to said positions and at the time said agreement, Exhibit 10, was negotiated and also on December 4, 1939 acquiesced in the holding of said positions by said crew-callers and in the assignment of said work to them and that it is inequitable for said Lackawanna Division No. 30 of The Order of Railroad Telegraphers to now claim to the contrary.

33. That Lackawanna Division No. 30 of The Order of Railroad Telegraphers and its General Chairman and the members thereof are estopped by their acts and conduct as well as by said agreements from claiming said positions held by said crew-callers at said Elmira yard office or any part of the work assigned to them by the plaintiff.

34. That without a declaration by this Court of the rights and obligations of the parties to this action under their said agreements if plaintiff recognizes the said claim of said Lackawanna Division No. 30 of The Order of Railroad Telegraphers, said System Board of Adjustment, Delaware, Lackawanna and Western Railroad, of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees will make an immediate protest and submit time slips to plaintiff for pay of men removed from said positions because said System Board of Adjustment, [fol. 330] Delaware, Lackawanna and Western Railroad, of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees regards these

said positions of crew-callers and the work assigned thereto as described and set forth in and covered by said agreement, Exhibit 6.

35. That without a declaration by this Court of the rights and obligations of the parties to this action under their said agreements if plaintiff continues to recognize the claim of said System Board of Adjustment, Delaware, Lackawanna and Western Railroad, of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees that the said positions of crew-callers and the work assigned thereto comes within said agreement, Exhibit 6, and does not come within said agreement, Exhibit 10, Lackawanna Division No. 30 of The Order of Railroad Telegraphers will prosecute its claim that three men on the telegraphers' extra-list who did no work themselves should be paid under said agreement, Exhibit 10, for said work performed by said crew-callers retroactively to May 1, 1938.

36. That said respective agreements between the parties to this action do not attempt to define the duties of the positions listed therein.

37. That no individual employee of the plaintiff represented by said Lackawanna Division No. 30 of The Order of Railroad Telegraphers has ever made a claim to the plaintiff to be assigned to the position of crew-caller in the Elmira [fol. 331] yard office or to have assigned to him work that has been or is now assigned to said crew-callers.

38. That no employee on the telegraphers' extra-list is entitled to any pay for work which has been assigned to crew-callers in the Elmira yard office since May 1, 1938.

39. That this action does not grow out of any dispute concerning rates of pay, rules or working conditions.

40. That this action does not involve the validity, construction, enforcement or effect of any statute.

41. That a bona fide dispute exists between the parties to this action requiring an interpretation of said respective contracts between the parties hereto and a declaration of the rights and obligations of said parties under said contracts.

42. That without such declaration and interpretation the plaintiff will be subjected by the defendants to a multiplicity of claims and otherwise will be irreparably damaged.

43. That plaintiff has no adequate remedy at law.

44. That this Court has jurisdiction of this action and of the controversy out of which it arises and should declare the respective rights and obligations of the parties under said agreements.

45. That the subject of this action has not been submitted to any other court, tribunal or board for determination, nor has any other court, tribunal or board assumed jurisdiction thereof.

[fol. 332] Conclusions of Law

1. That the plaintiff is entitled to judgment determining, construing and declaring the legal rights and relations of the parties hereto under the respective contracts mentioned in the complaint herein as follows:

(a) That said agreement, Exhibit 10, effective May 1, 1940, superseded and cancelled said agreement effective January 1, 1929, Exhibit 1, and is and has been since May 1, 1940 in full force and effect.

(b) That said Lackawanna Division No. 30 of The Order of Railroad Telegraphers, by and through its General Chairman, represents and since May 1, 1940 has represented only those employees occupying or qualified to hold those positions which are listed in said agreement effective May 1, 1940, Exhibit 10.

(c) That said agreement, Exhibit 6, effective January 1, 1939, superseded and cancelled said agreement effective October 1, 1934, Exhibit 3, and is and has been since January 1, 1939, in full force and effect.

(d) That said System Board of Adjustment, Delaware, Lackawanna and Western Railroad of Brotherhood of Railway and Steamship Clerk's Freight Handlers, Express and Station Employees, by and through its General Chairman, represents only those employees occupying or qualified to hold said positions described and set forth in said agreement effective January 1, 1939, Exhibit 6.

(e) That effective May 1, 1938, plaintiff, pursuant to the terms and conditions of said agreement effective [fol. 333] January 1, 1929, Exhibit 1, and without pro-

test by and with the express consent of said Laekawanna Division No. 30 of The Order of Railroad Telegraphers acting by and through its General Chairman, abolished the positions of the three towermen at "LV" Tower and three operators at Elmira Yard "MS", created three positions of "operator-towerman" at "LV" Tower, and transferred the work of the three towerman's and three operators' positions thus abolished which was recognized by the plaintiff as telegrapher's work to the said three operator-towermen located in said "LV" Tower and to the three clerk-operators located in Elmira passenger station, the positions of said three clerk-operators being listed in said Exhibit 1 and the work of said three operator-towermen being work recognized by plaintiff as telegrapher's work.

(f) That the said change made on May 1, 1938 was made only after consultation with the General Chairman of the Telegraphers who consented thereto and acquiesced therein provided the three operator-towermen at "LV" Tower were given a certain rate of pay greater than the rate previously paid for the positions abolished at "LV" Tower, that the consent of said General Chairman to said change was conditioned and predicated on such increases of pay for said newly established positions and that said increase of pay was so given by the plaintiff to said newly created positions.

[fol 334] (g) That the three crew-callers left in the Elmira Yard office have been assigned no work since May 1, 1938 which is recognized by plaintiff as telegrapher's work or which comes within the provisions of either of said agreements Exhibit 1 or Exhibit 10 and that the duties of said crew-callers are clerical in nature and are covered by said agreements Exhibit 3 and Exhibit 6.

(h) That said crew-callers and the positions held by them and the work assigned to them by the plaintiff are within said agreements, Exhibit 3 and Exhibit 6, during their said respective periods of effectiveness and not within said agreements, Exhibit 1 and Exhibit 10, during their said respective periods of effectiveness.

(i) That after extended negotiations between the plaintiff and the General Chairman and the General

Committee of Lackawanna Division No. 30 of The Order of Railroad Telegraphers and the Vice President of The Order of Railroad Telegraphers as to what positions should be included and listed in said agreement Exhibit 10, the positions of the three operators at Elmira Yard "MS" and of the three towermen at "LV" Tower, abolished May 1, 1938, were by mutual agreement specifically eliminated from said agreement effective May 1, 1940, Exhibit 10, and the positions of three operator-towermen at "LV" Tower, created May [fol. 335] 1, 1938, were by mutual agreement specifically included and listed in said agreement effective May 1, 1940, Exhibit 10.

(j) That all such work assigned to said crew-callers between October 1, 1934 and December 31, 1939 came within said agreement, Exhibit 3, and that all such work assigned to said crew-callers subsequent to January 1, 1939 and all such work now assigned to them comes within said agreement, Exhibit 6, and that at no time have said crew-callers been assigned or required by plaintiff as a part of their regular work or habitually allowed to handle any work which came within either of said agreements, Exhibit 1 or Exhibit 10.

(k) That said respective agreements between the parties to this action do not attempt to define the duties of the positions listed therein.

2. That a dispute exists between the plaintiff and said Lackawanna Division No. 30 of The Order of Railroad Telegraphers and the Members and General Chairman thereof and said System Board of Adjustment, Delaware, Lackawanna and Western Railroad, of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and the Members and General Chairman thereof as to whether said work assigned to said crew-callers comes within the said agreement, Exhibit 10, or within the said agreement, Exhibit 6, said Lackawanna Division No. 30 of The Order of Railroad Telegraphers [fol. 336] maintaining such work comes within said agreement, Exhibit 10, and said System Board of Adjustment, Delaware, Lackawanna and Western Railroad, of Brotherhood of Railway and Steamship Clerks, Freight Handlers,

Express and Station Employees maintaining that such work comes within its agreement, Exhibit 6.

3. That on December 4, 1939 the General Chairman of said Lackawanna Division No. 30 of The Order of Railroad Telegraphers agreed with the plaintiff that the arrangement then in existence and still in existence in respect to the positions of the three crew-callers in said Elmira yard and the said work assigned to them should be continued until such time as the Thurston Street grade crossing elimination project was completed and that said Thurston Street grade crossing elimination project has not yet been completed.

4. That said Lackawanna Division No. 30 of The Order of Railroad Telegraphers and its General Chairman at the time said change was made in respect to said positions and at the time said agreement, Exhibit 10, was negotiated and also on December 4, 1939, acquiesced in the holding of said positions by said crew-callers and in the assignment of said work to them and that it is inequitable for said Lackawanna Division No. 30 of The Order of Railroad Telegraphers to now claim to the contrary.

5. That Lackawanna Division No. 30 of The Order of Railroad Telegraphers and its General Chairman and the members thereof are estopped by their acts and conduct [fol. 337] as well by said agreements from claiming said positions held by said crew-callers at said Elmira yard office or any part of the work assigned to them by the plaintiff.

6. That no employee on the telegraphers' extra-list is entitled to any pay for work which has been assigned to crew-callers in the Elmira yard office since May 1, 1938.

7. That this action does not grow out of any dispute concerning rates of pay, rules or working conditions.

8. That this action does not involve the validity, construction, enforcement or effect of any statute.

9. That a *bona fide* dispute exists between the parties to this action requiring an interpretation of said respective contracts between the parties hereto and a declaration of the rights and obligations of said parties under said contracts.

10. That without such declaration and interpretation the plaintiff will be subjected by the defendants to a multiplicity of claims and otherwise will be irreparably damaged.

11. That plaintiff has no adequate remedy at law.

12. That this Court has jurisdiction of this action and of the controversy out of which it arises and should declare the respective rights and obligations of the parties under said agreements.

13. That the subject of this action has not been submitted to any other court, tribunal or board for determination, nor [fol. 338] has any other court, tribunal or board assumed jurisdiction thereof.

14. That this Court has jurisdiction of the parties to this action and that the plaintiff has the right to bring and maintain this action.

Let judgment be entered accordingly.

Dated, March 7th, 1946.

B. L. Newman, Justice of the Supreme Court.

JUDGMENT

At an Adjourned Trial and Special Term of the Supreme Court held in and for the County of Chemung at the Supreme Court Chambers in the City of Elmira, New York on the 6th day of August, 1945.

Present: Hon. Bertram L. Newman, Justice.

[Same Title.]

The issues in the above entitled action having regularly come on for trial before Mr. Justice Bertram L. Newman without a jury at an Adjourned Trial and Special Term of this Court held in and for the County of Chemung at the Supreme Court Chambers in the City of Elmira, New York on the 6th day of August, 1945 and the plaintiff having appeared [fol. 339] therein by Rowland L. Davis, Jr., Esq. of counsel, and the defendant Marion J. Slocum having appeared therein by John F. Dwyer, Esq. and Leo J. Hassenauer, Esq. of counsel and the defendant Louis J. Carlo having appeared therein by Willard H. McEwen, Esq. and A. H. Harpending, Esq. of counsel and said issues having been duly tried on the 6th, 7th and 9th days of August, 1945 and the

Court having heard the allegations and proofs of the parties and after due deliberation having duly made and filed its decision on the 7th of March, 1946 stating the facts found and the conclusions of law therefrom and directing judgment as hereinafter provided, now on motion of Sayles, Flannery & Evans, attorneys for the plaintiff,

It is adjudged, declared and decreed as follows:

1. That the plaintiff have and hereby is granted judgment determining, construing and declaring the legal rights and relations of the parties hereto under the respective contracts mentioned in the complaint herein as follows:

(a) That the agreement, Exhibit 10, effective May 1, 1940, referred to as Exhibit B in said complaint, superseded and cancelled said agreement effective January 1, 1929, Exhibit 1, referred to as Exhibit A in said complaint, and is and has been since May 1, 1940 in full force and effect.

(b) That Lackawanna Division No. 30 of The Order of Railroad Telegraphers, by and through its General Chairman, represents and since May 1, 1940, has represented only those employees occupying or qualified [fol. 340] to hold those positions which are listed in said agreement effective May 1, 1940, Exhibit 10.

(c) That the agreement, Exhibit 6, effective January 1, 1939, referred to as Exhibit D in said complaint, superseded and cancelled said agreement effective October 1, 1934, Exhibit 3, referred to as Exhibit C in said complaint, and is and has been since January 1, 1939, in full force and effect.

(d) That System Board of Adjustment, Delaware, Lackawanna and Western Railroad of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, by and through its General Chairman, represents only those employees occupying or qualified to hold said positions described and set forth in said agreement effective January 1, 1939, Exhibit 6.

(e) That effective May 1, 1938, plaintiff, pursuant to the terms and conditions of said agreement effective January 1, 1929, Exhibit 1, and without protest by and

with the express consent of said Lackawanna Division No. 30 of The Order of Railroad Telegraphers acting by and through its General Chairman, abolished the positions of the three towermen at "LV" Tower and three operators at Elmira Yard "MS," created three positions of "operator-towerman" at "LV" Tower, and transferred the work of the three towermen's and three operators' positions thus abolished which was recognized by the plaintiff as telegrapher's work to the said three operator-towermen located in said "LV" Tower and to the three clerk-operators located in Elmira passenger station, the positions of said three clerk-operators being listed in said Exhibit 1 and the work of said three operator-towermen being work recognized by plaintiff as telegrapher's work.

(f) That the said change made on May 1, 1938 was made only after consultation with the General Chairman of the Telegraphers who consented thereto and acquiesced therein provided the three operator-towermen at "LV" Tower were given a certain rate of pay greater than the rate previously paid for the positions abolished at "LV" Tower, that the consent of said General Chairman to said change was conditioned and predicated on such increase of pay for said newly established positions and that said increase of pay was so given by the plaintiff to said newly created positions.

(g) That the three crew-callers left in the Elmira Yard office have been assigned no work since May 1, 1938 which is recognized by plaintiff as telegrapher's work or which comes within the provisions of either of said agreements Exhibit 1 or Exhibit 10 and that the duties of said crew-callers are clerical in nature and are covered by said agreements Exhibit 3 and Exhibit 6.

(h) That said crew-callers and the positions held by them and the work assigned to them by the plaintiff are [fol. 342] within said agreements, Exhibit 3 and Exhibit 6, during their said respective periods of effectiveness and not within said agreements, Exhibit 1 and Exhibit 10, during their said respective periods of effectiveness.

(i) That after extended negotiations between the plaintiff and the General Chairman and the General

Committee of Lackawanna Division No. 30 of The Order of Railroad Telegraphers and the Vice-President of The Order of Railroad Telegraphers as to what positions should be included and listed in said agreement Exhibit 10, the positions of the three operators at Elmira Yard "MS" and of the three towermen at "LV" Tower, abolished May 1, 1938, were by mutual agreement specifically eliminated from said agreement effective May 1, 1940, Exhibit 10, and the positions of three operator-towermen at "LV" Tower, created May 1, 1938, were by mutual agreement specifically included and listed in said agreement effective May 1, 1940, Exhibit 10.

(j) That all such work assigned to said crew-callers between October 1, 1934 and December 31, 1939 came within said agreement, Exhibit 3, and that all such work assigned to said crew-callers subsequent to January 1, 1939 and all such work now assigned to them comes within said agreement, Exhibit 6, and that at no time have said crew-callers been assigned or required by plaintiff as a part of their regular work or habitually [fol. 343] allowed to handle any work which came within either of said agreements, Exhibit 1 or Exhibit 10.

(k) That said respective agreements between the parties to this action do not attempt to define the duties of the positions listed therein.

2. That a dispute exists between the plaintiff and said Lackawanna Division No. 30 of The Order of Railroad Telegraphers and the Members and General Chairman thereof and said System Board of Adjustment, Delaware, Lackawanna and Western Railroad, of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and the Members and General Chairman thereof as to whether said work assigned to said crew-callers comes within the said agreement, Exhibit 10, or within the said agreement, Exhibit 6, said Lackawanna Division No. 30 of The Order of Railroad Telegraphers maintaining such work comes within said agreement, Exhibit 10, and said System Board of Adjustment, Delaware, Lackawanna and Western Railroad, of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Sta-

tion Employees maintaining that such work comes within its agreement, Exhibit 6.

3. That on December 4, 1939 the General Chairman of said Lackawanna Division No. 30 of The Order of Railroad Telegraphers agreed with the plaintiff that the arrangement then in existence and still in existence in respect to the positions of the three crew-callers in said Elmira yard and the said work assigned to them should be continued until such [fol. 344] time as the Thurston Street grade crossing elimination project was completed and that said Thurston Street grade crossing elimination project has not yet been completed.

4. That said Lackawanna Division No. 30 of The Order of Railroad Telegraphers and its General Chairman at the time said change was made in respect to said positions and at the time said agreement, Exhibit 10, was negotiated and also on December 4, 1939 acquiesced in the holding of said positions by said crew-callers and in the assignment of said work to them and that it is inequitable for said Lackawanna Division No. 30 of The Order of Railroad Telegraphers to now claim to the contrary.

5. That Lackawanna Division No. 30 of The Order of Railroad Telegraphers and its General Chairman and the members thereof are estopped by their acts and conduct as well as by said agreements from claiming said positions held by said crew-callers at said Elmira yard office or any part of the work assigned to them by the plaintiff.

6. That no employee on the telegraphers' extra-list is entitled to any pay for work which has been assigned to crew-callers in the Elmira yard office since May 1, 1938.

7. That this action does not grow out of any dispute concerning rates of pay, rules or working conditions.

8. That this action does not involve the validity, construction, enforcement or effect of any statute.

[fol. 345] 9. That a *bona fide* dispute exists between the parties to this action requiring an interpretation of said respective contracts between the parties hereto and a declaration of the rights and obligations of said parties under said contracts.

10. That without such declaration and interpretation the plaintiff will be subjected by the defendants to a multiplicity of claims and otherwise will be irreparably damaged.

11. That plaintiff has no adequate remedy at law.

12. That this Court has jurisdiction of this action and of the controversy out of which it arises and should declare the respective rights and obligations of the parties under said agreements.

13. That the subject of this action has not been submitted to any other court, tribunal or board for determination, nor has any other court, tribunal or board assumed jurisdiction thereof.

14. That this Court has jurisdiction of the parties to this action and that the plaintiff has the right to bring and maintain this action.

Judgment this 7th day of March, 1946.

B. L. Newman, Justice of the Supreme Court. Thos.
B. Bowlby, Clerk.

[fol. 346]

PLAINTIFF'S EXHIBIT 4

April 30, 1938.

Mr. W. C. Alexander:

Answering yours April 29, file 48-A recommending a basic rate of 74¢ per hour for the new Towermen-telegraphers positions at Elmira, in other words eliminating the three positions paying 71¢ per hour and transferring the rates for the three positions from the "MS" office to the new positions in the tower.

This is approved.

I have discussed the change with General Chairman Voss of the Telegraphers' Committee and obtained his concurrence in the arrangement.

E. B. Moffatt.

2-h.

cc to C. D. Voss, G. A. Glaser.

[fol. 347]

PLAINTIFF'S EXHIBIT 5

National Mediation Board
Washington

Case No. R-358. Certification

October 12, 1937

James W. Carmalt, Chairman, Otto S. Beyer, William M. Leiserson, George A. Cook, Secretary.

In the Matter of Representation of Employees of the Delaware Lackawanna & Western Railroad Co., Clerical, Office, Station, Transfer, Platform and Storehouse Employees

The services of the National Mediation Board were invoked by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees to settle a dispute as to who may properly represent clerical, office, station, transfer, platform and storehouse employees of the Delaware, Lackawanna & Western Railroad Company, as provided by Section 2, Ninth, of the Railway Labor Act as amended.

Originally, two invocations for the services of the Board were made:

(1) From the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, requesting that the Board investigate and certify the name [fol. 348] or names or organizations authorized to represent clerks and office employees (including telephone operators), and station and storehouse employees other than clerks (including foremen who do not exercise supervision through sub-foremen), subject to excepting those employees occupying positions excepted from the provisions of the agreement of October 1, 1934, with the Association of Clerical Forces of the Lackawanna Railroad, and which are usually and ordinarily excepted from a rule and working conditions agreement, together with further exceptions of such employees as "Red Caps," "Ushers," "Travelers' Aids," etc., and;

(2) from the International Longshoremens's Association, Local 976, requesting the Board to determine the name or names of the individuals or organizations author

ized to represent marine freight handlers, truckers, loaders, stowers, operators, tractor drivers, gang foremen, all dock and common laborers at the Hoboken Lighterage Piers—Piers 13, 41 and 65, North River; and Pier 26, East River; and that the Board classify the employees named as "Marine Freight Handlers."

The two cases were consolidated for hearing. After the hearing had been held and consideration given to briefs and reply briefs, the Board, under date of August 13, 1937, issued its "Determination of Craft or Class," with the following conclusions:

"The invocation of our services by the I. L. A. in case M-199 is dismissed because it seeks the selection [fol. 349] of a representative for only a small part of the craft or class of clerical, station and storehouse employees.

"The protest of the Association against the holding of an election is dismissed for the reason that the protest is based upon an attempt to keep carved out of the craft or class of clerical, station and storehouse employees a portion of the craft or class for separate collective bargaining.

"A dispute is found to exist in Case R-358 among the employees in the craft or class of clerical, station and storehouse employees, and a mediator of the Board will be assigned to investigate the dispute as soon as other assignments of the Board will permit. The record does not permit the determination of the eligible list who may participate in the selection of the representative of the majority of the craft or class of clerical, station and storehouse employees, but it shall include all employees within those groups as of one craft or class and exclude therefrom only those employees of a confidential relationship with management which are usually and ordinarily excepted from a rule and working conditions agreement."

The case was assigned to Mediator P. D. Harvey for investigation. After finding that a dispute existed among the employees in question, the Board directed him to take a secret ballot to determine the choice of the employees. Representatives of the Association of Clerical Forces of the Lackawanna Railroad and of the Brotherhood of Railway

[fol. 350] and Steamship Clerks, Freight Handlers, Express and station Employees agreed to the list of eligible voters. They also signed the Report of Election, attesting that the election was fairly conducted, that the secrecy of the ballot was kept inviolate, and that the tabulation of the votes was accurate and complete.

Following is the result of the election:

Number of Employees Voting for Contesting Organizations				
	For Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees	For Association of Clerical Forces, Lackawanna Railroad	For Other Organiza- tion or Individual	Void Ballots
Clerical, Office Station, Transfer, Platform, and Storehouse Employees	1962	1037	16	72
				3387

On the basis of the investigation and report of election, the National Mediation Board hereby certifies that the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees has been duly designated and authorized to represent clerical, office, station, transfer, platform and storehouse employees of the Delaware, Lackawanna & Western Railroad Company for the purposes of the Railway Labor Act.

By order of the National Mediation Board.

(Signed) George A. Cook, Secretary. (Seal.)

[fol. 351]

PLAINTIFF'S EXHIBIT 7

Buffalo, N. Y., August 11th, 1939.

File 48-A

Mr. R. D. West, Local Chairman, B. of R. T., East Buffalo, N. Y.

DEAR SIR:

Referring to your letter of August 1st, requesting that three positions at Elmira be restored and three regular men, who lost their positions, be paid back pay retroactive to May 1st, 1938.

In the first place, the change was discussed with former General Chairman Voss and he concurred in the arrangement, which was put in effect; furthermore, the work properly coming within the scope of the Telegraphers' Agreement is being done by telegraphers.

The privilege of closing towers or telegraph offices to meet changing conditions has been recognized for years and is not prohibited by any agreement or practice. Under the circumstances, your request is declined.

Yours truly, W. C. Alexander, Superintendent.

Copy AHM

[fol. 352]

PLAINTIFF'S EXHIBIT 8

The Delaware, Lackawanna and Western Railroad Company

Office of General Superintendent
Scranton, Pa.

December 2, 1939.

E. B. Moffatt, General Superintendent 10507:

Mr. O. L. Chadwick, General Chairman, OofRT, Box 188,
Norwich, N. Y.

DEAR SIR:

Referring to the conference held at my office Thursday, November 9, 1939, with you and members of the General

Committee concerning cases submitted for consideration.
The following are answers thereto:

1. Clarks Summit Tower. Arrangements will be made to grant an increase to towerman of 2 cents per hour on each of three tricks, effective November 15, 1939.

2. Michigan Avenue Tower, Buffalo. Arrangements will be made to adjust rate of third trick towerman to conform to rates paid on first and second tricks, effective November 15, 1939.

3. Motor Car Line-ups. Present practises to continue except where specific objection is made in which event [fol. 353] we will endeavor to make adjustment as required. It will be understood that wherever operators are on duty line ups will be obtained by the operator and not by other employees.

4. B & P Branch Train Orders. We will arrange to re-classify the yard clerks at Portland as clerk operators. (Subject to agreement BofRC).

5. Relief for Regular Men. It is understood that your local committee will confer with the Superintendent of the M & E Division to work out a satisfactory basis for this. In respect to your request for a re-classification, we are compelled to decline this at present, but, there is no objection to working out a mutual satisfactory plan to take care of the relief situation.

6. East Buffalo Yard Operators. This request to be withdrawn.

7. Elmira Yard Operators. Present arrangement to be continued until such time as grade crossing project is completed when present tower operators will be transferred to the yard office.

8. BY Tower, Binghamton. We are willing to grant an increase of 3 cents per hour to each of the three tricks, effective November 15, 1939.

9. Teletype Printers. Teletype Printers now in service were not installed to reduce telegraphing and have not been used in lieu of telegraphing. Wherever teletype printers replace telegraph operators, the operation of such mechanical devices will be performed by telegraphers.

[fol. 354] 10. The use of Clearance Form B on Syracuse Division has been discontinued.

11. Brick Church increased rate of ticket clerk. Declined.

12. Inclusion of additional positions in Telegraphers' Schedule. We are willing to grant inclusion of the following stations effective December 1, 1939.

Boonton Freight
Dover Freight
Washington
Morristown Freight
New Village
Bangor
Nazareth
Plymouth
Danville
Owego
Mount Morris
Wayland.

And as per previous agreement, Clarks Summit and Kingston Ticket.

13. Subject to agreement with Clerk's Committee we are willing to re-classify clerical positions at Clifton, Millburn, Horseheads and Perkinsville as Assistant Agents. Other stations to be handled as at present. Agency at Mount Morris to be placed in Telegrapher's Schedule.

14. Change in seniority date ticket clerks Billington and Dotten, Hoboken Passenger Terminal, to June 7, 1938. This will be granted.

[fol. 355] 15. Restoration first trick operator Cortland. Declined. Not required.

16. Restoring rights on Telegrapher's Roster to Assistant Chief Dispatcher Frank O'Boyle, Scranton. Granted.

17. Increase rate agent Whitney Point. Willing to grant increase of \$10.00 per month effective November 15, 1939.

18. Stroudsburg. Increase rate of towerman account handling gates. Declined. Present practices were established originally on the basis of work performed which has always included the handling of gates.

Will you please acknowledge receipt of this letter signifying your acceptance as per our understanding.

Yours truly, E. B. Moffatt.

ebm/k

[fo. 356]

PLAINTIFF'S EXHIBIT 9

The Order of Railroad Telegraphers, Lackawanna Division
No. 30. (Label)

O. L. Chadwick, General Chairman, Box 188, Norwich, N. Y.
10507:

A. F. Kelley, General Sec. Treas., Box 302, Gouldsboro, Pa.

December 4, 1939.

Mr. E. B. Moffatt, General Superintendent, Delaware, Lackawanna and Western R. R., Scranton, Penn.

DEAR SIR:

This will acknowledge receipt and acceptance by our General Committee of your letter dated December 2, 1939 covering the 18 cases under dispute.

There is one slight error in your letter which I would like to have corrected Case #11 should read Ticket Agent instead of ticket clerk. (Brick church—OK.)

Will appreciate it if you will kindly arrange to have forwarded to me when convenient, the rates of pay for the [fol. 357] positions returned to our schedule or to be included in our schedule in cases #4, 13 and 12.

On behalf of our General Committee I desire to express to you our appreciation for the favorable decisions rendered in our favor.

Very truly yours, O. L. Chadwick.

4—Portland Yd. Clerk

12 Supervisory Agents

13 Asst. Agents—Clifton, Milburn, Etc.

OK to do this!

Ro

[fol. 358]

PLAINTIFF'S EXHIBIT 11

The Order of Railroad Telegraphers, Lackawanna Division
No. 30

O. L. Chadwick General Chairman, Box 188, Norwich, N. Y.

A. F. Kelley, General Sec.-Treas., Box 302, Gouldsboro, Pa.

Norwich, New York, June 4, 1942.

Mr. J. H. Kerbs, Superintendent, D. L. & W. R. R. Co.,
Buffalo, N. Y.

DEAR SIR:

The following information was given to the Buffalo Division dispatcher by crew clerk Jack Eggleston at Elmira at 4:00 A. M. Wednesday, June 3, 1942.

"Extra 1640 West delayed 30 minutes Wilawana cooling hot box on D. L. & W. 84891 Coal for East Buffalo—15 minutes Lowman setting out same car—No bill with car—New brass required".

This information is being furnished daily and is work which comes within the Scope of the Telegraphers' agreement and rightfully belongs to the employes in our class of [fol. 359] service as it is communications of record pertaining to train movements and consequently I request herewith that employes coming under our agreement be placed on these positions to perform these duties.

Kindly advise at your convenience.

Yours truly, O. L. Chadwick.

PLAINTIFF'S EXHIBIT 12

Buffalo, N. Y., June 10, 1942.

48-AT

Mr. O. L. Chadwick, General Chairman, O.R.T., Box 188,
Norwich, N. Y.

DEAR SIR:

Your letter of June 4 calling attention to the fact that the crew clerks at Elmira give dispatchers delay reports left at

Elmira Yard Office by train conductors, and requesting that the crew clerks' jobs be placed under the Telegraphers' Agreement.

Investigation developed that while not invariably handled in this manner, it has been the practice for a number of years for the crew clerks to telephone such information to the dispatcher, but effective at once, instructions have been issued that all such information must be transmitted through [fol. 360] the telegraph operator at Elmira interlocking tower, and Chief Train Dispatcher McLaughlin will arrange to have towerman get this information from the yard office as required.

Yours truly, J. H. Leslie, Superintendent.

JHL/C

PLAINTIFF'S EXHIBIT 13

Violations at Elmira Yard Office

The Delaware, Lackawanna and Western Railroad Company

E. B. Moffatt, Ass't to Vice President

140 Cedar Street, New York, June 30, 1942.

Mr. O. L. Chadwick, General Chairman, Telegraphers Committee—ORT—Norwich, N. Y.

DEAR SIR:

Referring to your letter June 23, addressed to Mr. Ray, concerning certain information given the Buffalo Division dispatcher by crew clerk J. Eggleston at Elmira.

The information telephoned to Buffalo by the crew clerk was not connected with the movement of trains, but was data concerning train delay, used by the dispatcher's force [fol. 361] in making up report of the day's operation. I can see no violation of your agreement.

As Mr. Lerbs advised you under date of June 10, this information will be handled through the telegraph operator at Elmira interlocking plant, who in turn must of necessity obtain it from the yard office.

Yours truly, E. B. Moffatt.

PLAINTIFF'S EXHIBIT 14

Telephone Waverly 4421

The Order of Railroad Telegraphers

J. L. Elliott, Vice-President, 2214 Washington Lane, Philadelphia, Pa. (Label)

October 9, 1942
30-69

Mr. E. B. Moffatt, Asst. Vice President, DL&W RR Co., 140 Cedar Street, New York City.

DEAR SIR:

Please refer to the ²Telegraphers' Agreement Wage Scale at page 24 where there is listed three Operator-Towerman positions, rate 74¢ per hour (now 84¢ per hour) by agreement, Elmira.

[fol. 362] Buffalo Division Circular P-51 dated October 5, 1942, assigned Towerman N. C. Hoag, not a telegrapher, to the 3rd trick Operator-Towerman position at Elmira which was on bulletin.

It is my understanding the towerman positions at Elmira were changed to Operator-Towerman, by agreement, at a time the Elmira Yard was closed not so long ago.

In your letter to me under date of October 5 in connection with our claim that switch tenders were performing communication service at that location you mention that train orders are handled through telegraphers at the tower or in the station. Moreover, we have registered complaint alleging clerks are performing our communication service at Elmira, and to that, your letter June 30, 1942, you say such communication would be handled through the telegraph operator at Elmira interlocking plant.

Under the circumstances recited, we request the senior Operator-Towerman bidding on the 3rd trick Operator-Towerman position at Elmira be assigned promptly, not a straight Towerman. I hope it will not be necessary to file a monetary claim.

A prompt reply will be appreciated.

Yours very truly, J. L. Elliott,

[fol. 363]

PLAINTIFF'S EXHIBIT 15

R. D. West, Local Chairman, 102 Elm Street, Lancaster, N. Y.

The Order of Railroad Telegraphers, Lackawanna Division
No. 30 (Label)

O. L. Chadwick, General Chairman, Box 188, Norwich, N. Y.

A. F. Kelley, General Sec-Treas., Box 302, Gouldsboro, Pa.

Lancaster N. Y., Aug. 1st, 1939.

Mr. W. G. Alexander, Sup't, Lackawanna Railroad, Buffalo,
N. Y.

DEAR SIR:

It is my understanding that on May 1st 1938 all three Operators positions at Elmira Yard Office were abolished, however none of their duties were discontinued but were divided up in various ways.

Train Orders and Clearance Cards moved to the L. V. Tower and handled by the Towermen.

Message work for the General Yard Master moved to Elmira Passenger Station.

Consists of Westbound symbol trains made out by Conductors and left at Bath.

Balance of work consisting of keeping records of all trains [fol. 364] except first class, furnishing both Buffalo and Scranton Divn dispatchers with all the information shown on train sheets, reporting release of trains arriving to the dispatchers and handling of consists and ice reports. All work which had been done for years by the Operators, turned over to the crew clerks. Who have since this time been handling work which I believe properly belongs to the Telegraphers.

In view of the above facts, I formally request herewith that the three Operators positions be immediately restored at Elmira Yard office and that the three regular assigned men who lost their positions through the abolishment of these positions be paid back pay retroactive to May 1st, 1938.

Kindly advise at your earliest convenience.

Yours truly, R. D. West, Local Chairman.

[fol. 365]

PLAINTIFF'S EXHIBIT 16..

The Order of Railroad Telegraphers, Lackawanna Division
No. 30 (Label)

30-32

Scranton, 4, Pa.

July 24, 1943.

Mr. P. M. Shoemaker, General Superintendent, Delaware,
Lackawanna and Western Railroad, New York City.

DEAR MR. SHOEMAKER:

Please refer to my letters of April 27th, May 24th and June 27th, which were in connection with a personal investigation of communication service at Elmira Yard office accompanied by Mr. Moffatt and two tracer letters for a reply.

In view of the many sustaining awards National Railroad Adjustment Board, Third Division, the organization is of the opinion this dispute can and should be adjusted promptly, and not be permitted to linger for further penalty money to accumulate.

We at this time wish to supplement Mr. J. L. Elliott's letter of October 16th 1942, that our claim is that three extra board employees be paid a day's pay each for each day the present practice continues, and retroactive to the date the practice was put in to effect.

[fol. 366] Please may I have your reply as early as convenient.

Yours very truly, M. J. Slocum, General Chairman.

DEFENDANT'S EXHIBIT A FOR IDENTIFICATION

The Order of Railroad Telegraphers, Lackawanna Division
No. 30 (Label)

O. L. Chadwick, General Chairman, Box 188, Norwich, N. Y.;
A. F. Kelley, General Sec.-Treas., Box 302, Gouldsboro,
Pa.

Norwich, New York.
June 23, 1942.

Mr. G. J. Ray, V. P. and General Manager, Delaware, Lackawanna and Western RR Co., 140 Cedar Street, New York, N. Y.

DEAR SIR:

On Wednesday June 3, 1942 at 4:00 A. M. the following information was given the Buffalo Division dispatcher by crew clerk Jack Eggleston at Elmira.

"Extra 1640 west delayed 30 minutes Wilawana cooling hot box on DL&W 84891 Coal for East Buffalo—15 [fol. 367] minutes Lowman setting out same car—No Bill with car—New Brass required".

The above information comes within the scope of duties covered by employees in our class of service and this information is being furnished regularly by employees not coming within the Scope of our Agreement and I request herewith that these duties at this location be assigned to the proper employees and also request that employees in our class of service be assigned to the positions handling this business.

This matter has been properly handled with the Superintendent of the Buffalo Division who has declined my request to assign employees coming under the scope of the Telegraphers' agreement to handle these duties and I am accordingly appealing the matter to you for your consideration. Kindly advise.

Yours truly, O. L. Chadwick.

[fol. 368] DEFENDANT'S EXHIBIT B FOR IDENTIFICATION

Telephone Waverly 4421.

The Order of Railroad Telegraphers, J. L. Elliott, Vice-President, 2214 Washington Lane, Philadelphia, Pa.

January 19, 1943.
30-32

Mr. P. M. Shoemaker, General Superintendent, DL&W R R Co., 140 Cedar Street, New York City.

DEAR MR. SHOEMAKER:

Please refer to the matter of persons at Elmira, other than those covered by and working under the provisions of the Telegraphers' Agreement performing, regularly, communication service; this subject having been discussed with Mr. Moffatt and as well letters exchanged, ended with mine of December 21, 1942.

I should like to have the Carrier's definite decision in the matter.

Will you please advise.

Yours very truly, J. L. Elliott.

[fol. 369] DEFENDANT'S EXHIBIT C

The Order of Railroad Telegraphers, Lackawanna Division
No. 30

O. L. Chadwick, General Chairman, Box 188, Norwich, N. Y.;
A. F. Kelley, General Sec. Treas., Box 302, Gouldsboro, Pa.

November 26, 1939.

All Exa Clerks—on Clerks Roster—Relief Agents get \$2.00 per day expenses.

Mr. E. B. Moffatt, General Superintendent, Delaware, Lackawanna and Western R. R. Co., Scranton, Penn.

DEAR SIR:

Having now heard from all the members of our General Committee I am now in a position to give you an answer to your memorandum covering the conference of November 9, 1939.

We are willing to accept your proposal of settlement but the Committee feels that we should have the following additional minor considerations. Cases 1 and 2 are accepted.—Case #3—Motor Car Line-ups—Accepted with the understanding that wherever Operators are on duty that these line-ups shall be obtained by the Operators and none other.—Case #4.—B.&P. Train Orders—We will accept if the reclassification at Portland yard is accomplished and I do not see any reason why it cannot be done.—Case #5.—Relief for regular men—Accepted provided this matter is successfully negotiated with Supt. Mr. J. H. Lerbs and we desire that Messrs. Joseph Byrnes, Ward Nagle Jr., [fol. 370] Richard Brown and Lawrence O'Connor are reclassified as relief Agents as was proposed in our conference with you.—Cases 6 and 7—East Buffalo and Elmira Operators.—We will accept this proposal with the understanding that if future developments warrant we are privileged to re-open these cases and desire that all regular message service be performed by Operators.—Cases 8, 9, 10 and 11 accepted.—Case No. 12—Supervisory agencies restored to schedule—we will accept but Committee believes we should have restored additional Agencies of Hoboken Ticket—Wayland and Bath—and I would like the Agency at Fulton in lieu of Paris Station which was closed July 1, 1939—Case #13.—The Committee cannot understand why we are offered Clifton, Millburn, Horseheads and Perkinsville and no mention made of Chatham and Lafayette and I believe you also mentioned Craigs and Coopers at our Conference. We would like to have all of the above mentioned Asst. Agents positions included in our Schedule as discussed. Case #14—Seniority date of Messrs. Billington and Dotten to be June 7—1938—Accepted. Cases, 15, 16, 17 and 18 Accepted.

We should also like acceptance of our proposal for a second trick Operator at Kingston, and included in the Memorandum the case of the towermen at Stroudsburg requesting additional compensation for the handling of the gates at that point.

You will note that none of the changes suggested herein involve any additional expense to the Company and I will [fol. 371] appreciate your careful consideration and advice at your early convenience.

Very truly yours, O. L. Chadwick.

DEFENDANT'S EXHIBIT D

O. L. Chadwick, General Chairman, Box 188, Norwich, N. Y.;
A. F. Kelley, General Sec. Treas., Box 302, Gouldsboro,
Pa.

The Order of Railroad Telegraphers, Lackawanna Division
No. 30 (Label)

September 4, 1939.

Mr. E. B. Moffatt, General Sup't., Lackawanna Railroad,
Scranton, Penn.

DEAR SIR:

Kindly note attached file in the matter of Substitution of Three Crew Clerks for Clerk-Operators in Elmira Yard Office May 1st, 1938.

The practice of closing towers and telegraph offices to meet changing conditions, as mentioned in Mr. Alexander's letter of Aug. 11th next attached, does not enter into this case at all, inasmuch Elmira Yard Office was not closed but [fol. 372]-Crew Clerks were substituted for Clerk-Operators, and these three positions had been in our schedule for about twenty years.

The three Crew Clerks at Elmira Yard Office are now doing Operator's duties on all three tricks every day and have done so since the change was made effective May 1, 1938. It is an established fact that the communications service belongs to the Telegraphers and because of this fact, and that these crew clerks are working daily with Train Dispatchers and performing duties which are Communications of record, we request that these three positions be restored to the Operators and that the three regular assigned men who lost their positions be paid for all time lost retroactive to May 1, 1938, also that the three positions at Elmira Ticket Office and at the Lehigh Valley Crossing tower adjacent to Elmira Yard Office be paid an additional Twenty Cents per hour on all six positions account added duties as per Rule 12 Para. (b) of our agreement, retroactive to May 1, 1938.

Several years ago, before the Telephone was in general use on the Railroads and the Telegraph was the only means of communication, the Clerks could not perform any Operators duties, but late years this practice has been more or less common, to permit and allow Clerks to perform duties

in connection with the Communications service that was impossible years ago, however, the Telephone has been inserted in the Scope of our Agreement and therefore, the same duties performed years ago before the advent of [fol. 373] the Telephone, by the Telegraph Operators, is still our work and we claim it as such. We base our claim herein outlined entirely on the recognized fact that the Communications of Record services belong to the Operators.

Kindly advise at your earliest convenience.

Yours truly, O. L. Chadwick.

DEFENDANT'S EXHIBIT E

O. L. Chadwick, General Chairman, Box 188, Norwich, N. Y.;
A. F. Kelley, General Sec. Treas., Box 302, Gouldsboro,
Pa.

The Order of Railroad Telegraphers, Lackawanna Division
No. 30

April 27, 1941.

Mr. G. W. Murphy, Superintendent, D. L. & W. R. R. Co.,
Scranton, Pa.

DEAR SIR:

I understand that at 1:10 A. M. Thursday morning April 24th the following message was issued at your dispatcher's office:

To C&E Exa 1647 East.

Run ahead of Second No. 8 Elmira to Scranton unless instructed to clear by dispatcher.

Sgt. G. W. M.

[fol. 374] This message was put out to the East end of Elmira yard for delivery to the crew on Extra 1647 east.

Kindly advise promptly to whom this message was transmitted for delivery at Elmira Yard.

Yours truly, O. L. Chadwick.

cc—A. F. Kelley.

DEFENDANT'S EXHIBIT F

The Order of Railroad Telegraphers, Lackawanna Division
No. 30

30-32

Scranton, Penna.
April 27, 1943.

Mr. E. B. Moffatt, Assistant to the President, 140 Cedar
Street, New York City.

DEAR MR. MOFFATT:

In connection with our joint personal investigation of certain communications service at Elmira Yard office not assigned to nor performed by employees within the purview of the Telegraphers' Agreement.

This communication service consists of matters of record, namely, receiving consists from Binghamton; sending consists to Binghamton; receiving consists from East [fol. 375] Buffalo and in turn, broken up from Danville; giving crews, cars, and tonnage to dispatcher; time crews are released to dispatcher; giving consists of trains to East Buffalo; even to the extent of keeping the same Eastward and Westward Yard train movement which includes, crew; loads and Empties; tonnage, which are OS'ed to the dispatcher from, just the same as the former operators were required to do. Moreover, better than seventy five percent of the work performed by said employee is within the meaning of our scope rule, and in accord with many awards from Division No. 3, of The National Railroad Adjustment Board.

As I stated at Elmira, the organization holds ample illustrative exhibits in support of our claim, therefore I must restate our original claim. That telegraphers' positions be established promptly. Pending such establishment, our claim is that three extra board employees be paid a day's pay each for each day the present practice continues.

Please may I have your reply as early as convenient.

Yours very truly, M. J. Slocum, General Chairman

[fol. 376]

DEFENDANT'S EXHIBIT G

The Order of Railroad Telegraphers, Lackawanna Division
No. 30 (Union Label)

30-32

Scranton, 4, Pa.

June 27, 1943.

Mr. P. M. Shoemaker, General Superintendent, Delaware,
Lackawanna and Western Railroad Co., 140 Cedar Street,
New York, N. Y.

DEAR SIR:

Please refer to my letter to Mr. Moffatt on April 27, which was in connection with a personal investigation of communication service at Elmira Yard office. I traced Mr. Moffatt on May 24 in respect thereto and his reply on May 26th states that subsequent to my letter of April 27th the file was referred to you for further handling.

Please may I have your reply as early as convenient.

Yours very truly, M. J. Slocum, General Chairman.

[fol. 377]

DEFENDANT'S EXHIBIT H

The Order of Railroad Telegraphers, Lackawanna Division
No. 30 (Union Label)

Scranton, 4, Pa.

August 6, 1943.

Mr. P. M. Shoemaker, General Superintendent Delaware,
Lackawanna and Western Railroad Co., 140 Cedar Street,
New York City.

DEAR MR. SHOEMAKER:

Please refer to my letter of July 24th, which in turn was a tracer letter to my letters of June 27th, May 24th, and April 27th, relative to and in connection with a personal investigation of communication service at Elmira Yard office accompanied by Mr. Moffatt, and his statement that the file was with you for further handling.

Again, In view of the many sustaining awards of the National Railroad Adjustment Board, Third Division, we are of the opinion this dispute should be adjusted promptly

on the property. Please may we have you- support and cooperation?

Could you furnish me with a reply at this time?

Yours very truly, M. J. Slocum, General Chairman.

[fol. 378]

DEFENDANT'S EXHIBIT I

The Order of Railroad Telegraphers, Lackawanna Division
No. 30 (Union Label)

30-32

Scranton, 4, Penna.
September 1, 1943.

Mr. G. J. Ray, Vice President, Delaware, Lackawanna and
Western Railroad Co., New York City.

DEAR MR. RAY:

Please refer to Mr. Moffatts letter of May 26, 1943 and file relative communication service at Elmira Yard Office, not assigned to nor performed by, employees within the purview of the 'Telegraphers' Agreement.

It is noted this claim was started on June 4, 1942. Much correspondence and several conferences has been held in an attempt to adjust the dispute, the last of which took place on April 20th, with Mr. Moffatt at Elmira, N. Y. in which we made a joint personal investigation of the violation. My letter on April 27, to Mr. Moffatt fully stated our position and claim, and being this violation is so clear cut and crystal clear, I was in hopes we could adjust the dispute promptly on the property.

My file reflects I traced Mr. Moffatt on May 24th; Mr. Shoemaker on June 27th, July 24th and August 6th, hence this appeal to you.

[fol. 379] Please may I have your reply as early as convenient.

Yours very truly, M. J. Slocum, General Chairman.

DEFENDANT'S EXHIBIT J

Telephone Waverly 4421.

The Order of Railroad Telegraphers

I. L. Elliott, Vice-President, 2214 Washington Lane, Philadelphia, Pa. (Union Label)

October 16, 1942.

30-32

Mr. E. B. Moffatt, Asst. Vice President, DL&W RR Co., New York City.

DEAR SIR:

Refer to your letter of June 30, 1942 directed to the then General Chairman, Mr. O. L. Chadwick, relative complaint that persons not under the Telegraphers' Agreement, at Elmira, were being permitted and/or required to perform communication service, instead of a strict compliance with the rules of the said Agreement.

You say in your letter, above mentioned, that the information telephoned by crew clerks was not connected with the movement of trains, therefore, you could not see [fol. 386] a violation of the Telegraphers' Agreement. You further stated, in substance, that Superintendent Lerbs would require the communication service to be placed where it belongs, i.e., with employees working under said Agreement.

I have had an opportunity to investigate the matter and find it to be a daily practice for clerks in the Elmira Yard to handle communication business with Buffalo, those persons in Buffalo who are parties to the transactions *may be either train dispatchers, telegraphers, or clerks.*

Your attention is called to the Scope Rule and Rule 12 (a) of the Telegraphers' Agreement, along with the many awards of the National Railroad Adjustment Board, Third Division, which give to employees working under said Agreement the exclusive right to such duties; otherwise contracts such as we have here would be without meaning. The Carrier apparently believes it necessary to maintain communication service at the Elmira Yard, therefore, this is claim that telegraphers' positions be established promptly. Pending such establishment, our claim is that three extra board employees be paid a day's pay each for each day the present practice continues.

I might say that in my possession are illustrations of the communication service now operative at that location. Will you please advise.

Yours very truly, I. L. Elliott.

[fol. 381]

DEFENDANT'S EXHIBIT K

Telephone Waverly 4421.

The Order of Railroad Telegraphers

I. L. Elliott, Vice-President, 2214 Washington Lane, Philadelphia, Pa. (Union Label)

November 23, 1942.

30-32

Mr. E. B. Moffatt, Asst. to Vice-President, DL&W RR Co., New York City.

DEAR MR. MOFFATT:

Please refer to the exchange of letters and our discussion of the matter of communication service being required at the Elmira yard and not being assigned to employees working under the Telegraphers' Agreement.

During our discussion of the matter in your office October 19, 1942, according to the notes made by me at the time, you stated the practice was of long standing, yet the violation would be corrected and that you would write me accordingly.

My letter which remains unanswered is dated October 16, 1942.

Will you please confirm.

Yours very truly, I. L. Elliott.

Letter Oct. 22 intended to cover entire situation at Elmira.

[fol. 382]

DEFENDANT'S EXHIBIT L

The Order of Railroad Telegraphers

J. L. Elliott, Vice-President, 2214 Washington Lane, Philadelphia, Pa. (Union Label)

Telephone Waverly 4421.

30-32

December 21, 1942.

Mr. E. B. Moffatt, Asst. to Vice-President, DL&W R R Co.,
140 Cedar Street, New York City.

DEAR MR. MOFFATT:

This refers to your letter of December 17th in which you deal with two subjects, viz., the assignment of non-telegrapher Hoag to an Operator-Towerman position at Elmira and the matter of persons other than telegraph schedule employees performing communication service of record at the Elmira Yard, as covered by my files 30-32 and 30-69. I have written you another letter today regarding the Hoag affair, my file 30-69. I shall here deal with the communication service dispute at Elmira Yard; my file 30-32.

There have been so many documents issued in the forms of decision and or awards from competent authority dealing with the scope rules of the several agreements, that it seems almost unbelievable that we are apart as to the meanings thereof. Beginning with the Railroad Administration and on down the line, it has been clearly stated [fol. 383] the sort of service covered by the Telegraphers' Agreement. That service is not confined to communication service pertaining to train orders and or messages concerning the movement of trains, as you have indicated by letter and in conference, as being your contention.

I have cited to you a most recent award, namely, Award No. 1983, which is quite clear and is nothing more nor less than a confirmation of previous decisions and or awards. That which has been stated in Awards 615, 1983 and others is our contention now, and has always been, so, we do not understand why your people are hesitant or reluctant to give application to the scope rule as is and has been indicated. There is a definite line drawn around our scope rule. We think you ought meet that line without further appeal. The duties being performed at Elmira Yard (com-

munication service) by persons not under the Telegraphers' Agreement are those well within the scope of the said agreement? Will you meet our claim?

Yours very truly, J. L. Elliott.

STIPULATION AS TO EXHIBITS

(Same Title)

It is hereby stipulated and agreed, that the exhibits offered and received in evidence upon the trial herein, other than [fol. 384] those contained in the within record, need not be printed or included in this record but may be produced and used by any of the parties upon the argument or submission of the appeal and may be referred to by any of the parties in their respective briefs and submitted to the court with the same force and effect as if printed and included in said record on appeal.

Dated, December —, 1946.

Sayles, Flannery & Evans, Attorneys for Plaintiff-Respondent. John F. Dwyer, Attorney for Defendant-Appellant. Mandeville, Buck, Teeter & Harpending, Attorneys for Defendant.

STIPULATION WAIVING CERTIFICATION

(Same Title)

It is hereby stipulated that the foregoing, consisting of the Notice of Appeal, Summons, Complaint, Answer of Defendant Louis J. Carlo, etc., Answer of Defendant-Appellant Marion J. Slocum, Notice of Motion, Memorandum by Newman, J., Order Denying Motion for Dismissal of Complaint, Decisions and Judgments, are true and correct copies of the originals thereof on file in the office of the Clerk of the [fol. 385] County of Chemung, and certification of the same is hereby waived.

Dated, December —, 1946.

Sayles, Flannery & Evans, Attorneys for Plaintiff-Respondent. John F. Dwyer, Attorney for Defendant-Appellant. Mandeville, Buck, Teeter & Harpending, Attorneys for Defendant.

STIPULATION SETTLING CASE

It is hereby stipulated and agreed that the foregoing case contains all the evidence given upon the trial herein and that an order may be made settling and filing the same as the case on appeal herein.

Dated, December —, 1946.

Sayles, Flannery & Evans, Attorneys for Plaintiff Respondent. John F. Dwyer, Attorney for Defendant Appellant. Mandeville, Buck, Teeter & Harpending, Attorneys for Defendant.

[fol. 386] ORDER SETTLING AND FILING CASE

Pursuant to the above stipulation, the within printed case is hereby settled and ordered filed in the office of the Clerk of the Appellate Division, Third Department, as the case on appeal herein.

Dated, December —, 1946.

Bertram L. Newman, Justice Presiding.

[fol. 386a] SUPPLEMENTAL RECORD

STATE OF NEW YORK SUPREME COURT, APPELLATE DIVISION,
THIRD DEPARTMENT

Supreme Court, County of Chemung

THE DELAWARE, LACKAWANNA, AND WESTERN RAILROAD
COMPANY, Plaintiff,

against

MARION J. SLOCUM, as General Chairman of Lackawanna Division No. 30 of The Order of Railroad Telegraphers, and Louis J. Carlo, as General Chairman of System Board of Adjustment, Delaware, Lackawanna and Western Railroad, of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, Defendants

DECISION

Trial and Special Term, Chemung County, August 6, 1945
Action for Declaratory Judgment.

Sayles & Evans, Esqs. (Rowland L. Davis, Jr., Esq., of Counsel), for the Plaintiff.

John F. Dwyer, Esq., and Leo J. Hassenauer, Esq., for the Defendant, Marion J. Slocum [fol. 386b] Mandeville, Buck, Tieder & Harpending, Esqs., (Willard H. McEwen, Esq. and M. H. Harpending, Esq., of Counsel), for the Defendant, Louis J. Carlo.

NEWMAN, J.:

The plaintiff brings this action seeking a declaratory judgment to determine the rights of the plaintiff and defendants under agreements existing between the plaintiff and each of the defendants.

At the close of the plaintiff's case, the defendants made a motion for a dismissal of the complaint on the ground that the plaintiff had failed to establish a *prima facie* case and upon the further ground that there is a dispute as to the jurisdiction of the two defendant organizations over certain operations on the plaintiff's road and the distribution of work performed by certain employees of the plaintiff.

This motion was denied and renewed by the defendants at the close of the case. The defendant's briefs are concerned almost exclusively with the questions raised by these motions.

The question of jurisdiction was raised before trial and decided adversely to defendants. (183 Misc. 454; 56 Federal Supplement 634 and 269 App. Div. 467). We can see little in the evidence to cause us to change our opinion. The motions to dismiss are, therefore, denied.

The positions covered by the Telegraphers Agreement, [fol. 386c] locations and rates of pay are set forth in a Schedule which is made a part of the Agreement. This included at Elmira three clerk operators at the Passenger Station, three operators at the Yard Office and three towermen at the Yard Tower. There was at the time also three crew clerks, then as now represented by the Clerk's Union and not included in the Schedule annexed to the Telegraphers Agreement. On May 1, 1938, in the interest of economy, after consultation with the General Chairman of the Telegraphers, who acquiesced in the change, the three positions of operators at the Yard Office and the three positions of towermen were abolished and three new positions at the Tower were created and known as operator-towermen.

The operator-towermen were given a rate of pay greater than the rate previously paid for the positions abolished at the Tower.

The handling of messages by telegraph, train orders, clearance cards, etc., formerly handled by the operators at the Yard Office, was transferred to the new position of operator-towerman and to the clerk operators at the Passenger Station. The telegraph instruments were taken out of the Yard Office and three crew callers left in that office. The present Agreement between the plaintiff and the Telegraphers became effective May 1, 1940, and was negotiated sometime subsequent to the above mentioned change and the crew callers are not included in the Schedule annexed to that Agreement. The Telegraphers now claim pay for three {fol. 386d} men, unidentified, who did no work, for work performed by the crew callers retroactively to May 1, 1938.

The agreements between the parties do not attempt to define the duties of the positions listed.

The contracts should be reasonably construed, taking into consideration the change that has taken place since the telephone has supplanted to a large extent the telegraph. It is necessary, therefore, to consider what work has traditionally been performed by telegraphers. Before the telephone came into use in the operation of trains, the distinction between the duties of a telegrapher and a clerk was apparent. All messages in regard to the operation of trains and the conduct of the plaintiff's business which from their nature required dispatch were handled by the telegraphers. Since the telephone came into general use, these are handled by telephone and many communications which would have formerly been sent through the mails are now for convenience and speed handled by telephone.

The Telegraphers contend that any conversation over the telephone that is important enough to be written down and made a record of is considered communication service, *i. e.*, should be handled by telegraphers. The Railroad Company has never agreed to such a rule. With the telephone in such general use as it is at the present time, it is obvious that with all the varied messages upon a vast number of subjects that are handled by phone in the operation of plaintiff's business, that the proposed rule is too broad. It would seem {fol. 386e} the proposed rule should be qualified by a provision that the messages must have a direct relation to the

operation of the trains or be of such a nature that speed in its transmission is essential for the efficient conduct of the plaintiff's business, i. e., that other means of transmission would be impracticable.

The question is not whether some clerk occasionally and incidental to his regular work gives or receives some message that is properly a telegrapher's work. The question is whether he has been assigned such work by plaintiff or is expected as a part of his regular work or habitually allowed to handle such messages. It has not been established that the crew callers are performing telegraphers' work. The proof is to the contrary. Except in some instances where the crew callers were performing telegraphers' work and upon its being called to the attention of the officials of the plaintiff, the condition has been remedied.

In construing the contracts, the construction adopted by the parties is entitled to considerable weight. The defendant Telegraphers acquiesced in the present arrangement at the time it was put into effect and no objection was made by it until some time thereafter. The plaintiff having relied upon the acquiescence of the defendant Telegraphers and gone ahead under the plan, the Telegraphers are now estopped from claiming that it is a violation of their contract, at least until the Thurston Street Elimination is completed. [fol. 386f] We, therefore, hold that the position of crew callers at the Elmira Yard Office are not positions within the agreement with the Telegraphers and are properly classed under the agreement with the Clerks.

Submit findings and judgment accordingly.

Dated, January 9, 1946.

B. L. Newman, J. S. C.

[fol. 386g] ADDITIONAL PAPERS TO COURT OF APPEALS

[fol. 387] NOTICE OF APPEAL TO COURT OF APPEALS

STATE OF NEW YORK, SUPREME COURT, COUNTY OF CHEMUNG

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,
Plaintiff-Respondent,

VS.

MARION J. SLOCUM, as General Chairman of Lackawanna Division No. 30 of the Order of Railroad Telegraphers, Defendant-Appellant, and Louis J. Carlo, as General Chairman of System Board of Adjustment, Delaware, Lackawanna and Western Railroad, of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, Defendant

SIRS:

Please take notice, that pursuant to leave granted by an order of the Court of Appeals of the State of New York, in the above entitled action, dated and entered on the 3rd day of March, 1949, in the office of the Clerk of the Court of Appeals, the defendant-appellant above named, hereby appeals to the Court of Appeals of the State of New York from the judgment of affirmance entered herein in the office of the Clerk of the County of Chemung on the 30th day of November, 1948, pursuant to the order of the Appellate Division [fol. 388] of the Supreme Court for the Third Judicial Department, entered in the office of the Clerk of the said Appellate Division on the 22nd day of November, 1948, which judgment unanimously affirmed a final judgment of the Supreme Court Chemung County, entered in the office of the Clerk of Chemung County on the 7th day of March, 1946, in favor of the above named plaintiff-respondent, and against the above named defendant-appellant, and defendant-appellant hereby appeals from each and every part of the said judgment as well as from the whole thereof.

Dated: Buffalo, New York, March 30th, 1949.

Yours, etc., John F. Dwyer, Attorney for Defendant-Appellant, Office and P. O. Address, 926 Ellicott Square, Buffalo, New York.

To: Sayles, Flannery & Evans, Attorneys for Plaintiff-Respondent. Mandeville, Buck, Teeter & Harpending, At-

torneys for Defendant. Clerk of County of Chemung. Clerk of the Court of Appeals.

[fol. 389]

ORDER OF AFFIRMANCE.

At a Term of the Appellate Division of the Supreme Court held in and for the Third Judicial Department at the Court House in the City of Albany, New York commencing on the 8th day of November, 1948.

Present: Hon. James P. Hill, Presiding Justice; Hon. O. Byron Brewster, Hon. Sydney F. Foster, Hon. Pierce H. Russell, Hon. Martin W. Deyo, Associate Justices.

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, Plaintiff-Respondent,

against

MARION J. SLOCUM, as General Chairman of Lackawanna Division No. 30 of the Order of Railroad Telegraphers, Defendant-Appellant, and Louis J. Carlo, as General Chairman of System Board of Adjustment, Delaware, Lackawanna and Western Railroad, of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, Defendant.

An appeal having been taken to this Court by the above named defendant-appellant Marion J. Slocum as General [fol. 390] Chairman of Lackawanna Division No. 30 of the Order of Railroad Telegraphers from the final judgment of the Supreme Court, entered in this action in the office of the Clerk of Chemung County on the 7th day of March, 1946 wherein and whereby the rights of the parties herein under various contracts between them were declared and adjudged and said appeal having been argued at the September, 1948 term of this Court by Mr. John F. Dwyer for said defendant-appellant and by Mr. Pierre W. Evans for the plaintiff-respondent and due deliberation having been had thereon and the Court having handed down its unanimous decision at this term on the 10th day of November, 1948 that the judgment appealed from be affirmed with costs, it is hereby

Ordered that the judgment so appealed from be and the same hereby is unanimously affirmed and that the plaintiff-

respondent recover of the defendant-appellant the costs of this appeal.

John S. Herrick, Clerk.

Sirs:

Please take notice that the within is a copy of an order of affirmance duly filed and entered herein in the office of the Clerk of the Appellate Division of the Supreme Court, Third Judicial Department, at Albany, New York, on the 22d day of November, 1948, a duly certified copy of which order was duly filed and entered herein in the Chemung [fol. 391] County Clerk's office on the 30th day of November, 1948.

Yours, etc., Sayles & Evans, Attorneys for Plaintiff-Respondent, 415 East Water Street, Elmira, New York.

To John F. Dwyer, Esq., Attorney for Defendant-Appellant Marion J. Slocum, as General Chairman of Lackawanna Division No. 30 of the Order of Railroad Telegraphers, and Mandevilla, Buck, Teeter & Harpending, Esqs., Attorneys for Defendant Louis J. Carlo, as General Chairman of System Board of Adjustment, Delaware, Lackawanna and Western Railroad, of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

JUDGMENT OF AFFIRMANCE

(Same Title)

The defendant Marion J. Slocum as General Chairman of Lackawanna Division No. 30 of the Order of Railroad Telegraphers having appealed to the Appellate Division of the Supreme Court, Third Judicial Department, from the [fol. 392] judgment of the Supreme Court, Chemung County, entered in the Chemung County Clerk's office on the 7th day of March, 1946, wherein and whereby the rights of the parties herein under certain contracts between them were declared and adjudged and said appeal having been heard and the said Appellate Division, by an order entered in the office of the Clerk of said Appellate Division on the 22d day of November, 1948, having unanimously ordered that the judgment so appealed from be affirmed and that the plain-

tiff-respondent recover of said defendant-appellant the costs of said appeal and a duly certified copy of said order together with the record on said appeal having been remitted to the office of the Clerk of the County of Chemung and the plaintiff-respondent's costs of said appeal having been duly taxed at the sum of \$98.65, it is, on motion of Sayles & Evans, attorneys for said plaintiff-respondent.

Adjudged that the said judgment so appealed from be and the same hereby is unanimously affirmed and that the plaintiff-respondent, The Delaware, Lackawanna and Western Railroad Company, recover of the defendant-appellant, Marion J. Slocum as General Chairman of Lackawanna Division No. 30 of the Order of Railroad Telegraphers, the sum of \$98.65, its costs on appeal as taxed, and have execution therefor.

Judgment this 30th day of November, 1948.

Thos. B. Bowlby, Clerk.

[fol. 393]. OPINION OF APPELLATE DIVISION ON AFFIRMANCE
OF JUDGMENT

(Same Title)

This is an appeal by Marion J. Slocum, as General Chairman of Lackawanna Division No. 30 of the Order of Railroad Telegraphers, from a declaratory judgment of the Supreme Court, Chemung County, entered on March 7, 1946, which declared that the crew callers in the Elmira Yard Office of the plaintiff and the positions held by them and the work assigned to them by the plaintiff are within the plaintiff's agreement with the Clerk's Union and not within the plaintiff's agreement with the Telegraphers' Union. The judgment further declared that the Telegraphers' Union and its general Chairman and members are estopped by their acts and conduct as well as by their agreement from claiming such positions or any part of the work assigned to said crew callers.

PER CURIAM:

Although the National Railroad Adjustment Board is a proper body to hear controversies arising under employment contracts pursuant to the Railway Labor Act, nevertheless, State Courts are not deprived of jurisdiction under the circumstances of this case. Delaware, Lackawanna and

Western R. R. Co. v. Slocum, 260 App. Div. 467; Moore v. Illinois Central R. Co., 312 U. S. 630.

The Pitney case upon which appellant relies was a decision relating to the dual capacity of the Court, but did not overrule the holding of the Moore case.

[fol. 394] The dispute between the parties arose mainly under the construction of agreements entered into between the Railroad and the Order of the Railroad Telegraphers, and also between the Railroad and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

The Court below properly construed the contracts and had the power in its discretion to declare the rights and legal relations of the parties by declaratory judgment. Civil Practice Act, Sec. 473.

Judgment appealed from unanimously affirmed with costs. Present—Hill, P. J., Brewster, Foster, Russell and Deyo, J.J.

[fol. 395] ORDER GRANTING MOTION FOR LEAVE TO APPEAL TO
COURT OF APPEALS

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany, on the third day of March, A. D. 1949.

Present: Hon. John T. Loughran, Chief Judge, Presiding.
THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, *Respondent*,

vs.

MARION J. SLOCUM, as General Chairman of Lackawanna Division No. 30 of The Order of Railroad Telegraphers, Appellant,

LOUIS J. CARLO, as General Chairman of System Board of Adjustment, Delaware, Lackawanna and Western Railroad, of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, Defendant.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part

of the appellant herein, and papers having been duly submitted thereon, and due deliberation thereupon had: [fol. 396] Ordered, that the said motion be and the same hereby is granted.

A Copy.

Raymond J. Cannon, Deputy Clerk. (Seal.)

PLAINTIFF'S EXHIBIT 1

The Delaware, Lackawanna and Western Railroad Company

Rules and Rates of Pay for Telegraphers

January 1, 1929

Form T 56

Rule 1

Scope

Effective January 1, 1929, the following rules and working conditions will apply to telegraphers, telephone operators (except switchboard operators); agents, agent-telegraphers and agent-telephoners (as shown in the rate schedule); towermen, levermen and tower and train directors.

[fol. 397]

Rule 2

Basic Day

Except as specified in Rule 3, eight (8) consecutive hours, exclusive of the meal hour, shall constitute a day's work, except that where two or more shifts are worked, eight (8) consecutive hours with no allowance for meals shall constitute a day's work.

Rule 3

Intermittent Service

At small non-telegraph or non-telephone agencies, where service is intermittent, eight (8) hours' actual time on duty within a spread of twelve (12) hours, shall constitute a day's work. Employees filling such positions shall be paid overtime for all time actually on duty or held for duty in excess of eight (8) hours from the time required to report for duty.

to the time of release within twelve (12) consecutive hours and for all time in excess of twelve (12) consecutive hours, computed continuously from the time first required to report until final release. Time shall be counted as continuous service in all cases where the interval of release from duty does not exceed one (1) hour.

Exceptions to the foregoing paragraph shall be made for individual positions when agreed to between the management and duly accredited representatives of the employees. For such excepted positions the foregoing paragraph shall not apply.

[fol. 398] This rule shall not be construed as authorizing the working of split tricks where continuous service is required.

Intermittent service is understood to mean service of a character where during the hours of assignment there is no work to be performed for periods of more than one (1) hour's duration and service of the employees can not otherwise be utilized.

Employees covered by this rule will be paid not less than eight (8) hours within a spread of twelve (12) consecutive hours.

Rule 4

Overtime

Except as otherwise provided, time worked in excess of eight (8) hours, exclusive of meal period, on any day, will be considered overtime and paid on the actual minute basis at time and one-half rate.

Rule 5

Call Rule

Employees notified or called to perform work not continuous with the regular work period will be allowed a minimum of three (3) hours for two (2) hours' work or less, and if held on duty in excess of two (2) hours, time and one-half will be allowed on the minute basis.

Rule 6

Meal Period

(a) Where but one shift is worked, employees will be allowed sixty (60) consecutive minutes between eleven-thirty

[fol. 399] (11:30) and two o'clock (2:00), day or night, for meal.

(b) If the meal period is not afforded within the allowed or agreed time limit and is worked, the meal period shall be paid for at the pro-rata rate and thirty (30) minutes, with pay, in which to eat shall be afforded at the first opportunity.

Rule 7

Starting Time

Regular assignments shall have a fixed starting time and the regular starting time shall not be changed without at least eighteen (18) hours advance notice to the employees affected.

Rule 8

Sunday and Holiday Work

Employees will be excused from Sunday and holiday duties as much as the condition of business will permit.

Time worked on Sundays and the following holidays—namely, New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas (provided when any of the above holidays fall on Sunday, the day observed by the State, Nation, or by proclamation shall be considered the holiday), shall be paid for at the regular hourly rate when the entire number of hours constituting the regular week-day assignment are worked.

When notified or called to work on Sundays and the above specified holidays a less number of hours than constitute a [fol. 400] day's work within the limits of the regular week-day assignment, employees shall be paid a minimum allowance of two (2) hours at overtime rate for two (2) hours of work or less, and at the regular hourly rate after the second hour of each tour of duty. Time worked before or after the limits of the regular week-day assignment shall be paid for in accordance with overtime and call rules.

Rule 9

Basis of Pay

All employees herein specified will be paid on hourly basis.

Rule 10

Discipline and Grievances

(a) No employe shall be disciplined without a fair hearing by a designated officer of the Company. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, he is entitled to be apprised of the precise charge against him. He shall have reasonable opportunity to secure the presence of necessary witnesses and shall have the right to be there represented by representatives of his choosing. If the judgment shall be in his favor, he shall be compensated for the wage loss, if any, suffered by him.

(b) The management accords to employes the right to appeal to its highest officers.

[fol. 401]

Rule 11

Suspension of Work During Regular Hours

Employes will not be required to suspend work during regular hours or to absorb overtime.

Rule 12

Classification of Employes, New Positions, Etc.

(a) Where existing payroll classification does not conform to rule 1, employes performing service in the classes specified therein shall be classified in accordance therewith.

(b) When the duties of a position are materially changed, compensation will be changed to conform with similar position.

(c) When new positions are created, compensation shall be established in conformity with similar positions on the same sub-district or sub-division under a Superintendent's jurisdiction, or in the event there is no similar position on that sub-district or sub-division, then upon similar positions on contiguous districts.

Rule 13

Court Duty and Investigations

(a) Employees temporarily engaged in business of the Company outside the line of their regular duties, at court or otherwise, will be paid their regular wages and necessary expenses while so engaged, court fees and mileage to be assigned to the Company.

[fol. 402] (b) Employees required to attend investigations, will be paid for all time lost, if not at fault.

Rule 14

Extra Work for Regular Men, and Relief Men

(a) Employees holding temporary or permanent assignments required to do relief work at any office other than the one to which assigned, shall be paid straight time on the minute basis at the rate of the higher paid position while traveling to and from the temporary assignment, in no case to exceed eight hours' pay. In addition to this they shall be reimbursed for any time lost in making the change, also receive \$1.00 per day for expenses.

(b) Regular relief employees will be allowed \$2.00 per calendar day for expenses while away from their headquarters, when, due to train service, such men cannot live at home, provided no undue hardships are imposed. This does not apply to extra men.

(c) Telegraphers and telephoners required to relieve employees at non-telegraph stations will be paid not less than the minimum rate for telegraphers.

Rule 15

Seniority and Promotions

(a) Applicants for positions requiring posting will do so on their own time. When stations accounts are transferred each employee will be paid the regular rate for that [fol. 403] station for the time required to make the transfer with the minimum of one (1) day. Employees who are ordered into positions by the management will be allowed time for posting if necessary.

(b) Employees will be in line for promotion and where ability and qualifications are sufficient, in the judgment of the Management, seniority will prevail.

(c) New positions or vacancies will be promptly bulletined for a period of ten days and assigned promptly according to the above rules. Name of the successful bidder will be posted.

Employees awarded bulletined positions and failing to qualify within a reasonable time, may be displaced but shall retain their seniority rights and may bid on any bulletined position, but may not displace any regularly assigned employee.

If the position to which an employee is assigned is discontinued before he worked the position, the assignment shall be considered null and void. An employee has made his selection when he has notified the proper official of his choice.

(d) Employees promoted to official or supervisory positions may retain their seniority rights; if demoted they will go on the extra list until a vacancy occurs to which their seniority and merit give them right.

(e) Employees dismissed from the service of the railroad and re-employed within one year shall not lose their seniority. [fol. 404] Those who leave the service voluntarily and are re-employed, will rank as new men.

(f) Seniority begins at the time the employee starts to work in the class in which he is regularly employed.

(g) Seniority rosters of employees on each Division will be revised in January of each year, and a copy sent to each office and to the General and Local Chairmen.

(h) Employees transferred from one Superintendent's division to another, by their own request, shall rank from date of transfer on seniority list of division to which transferred.

(i) When the railroad transfers an extra employee from one division to another, temporarily, such employee shall retain his seniority on the division from which transferred and rank on the division to which transferred from the date of transfer. If he remains on the new division three months, he shall surrender seniority on division from which transferred.

(j) When an office is transferred from one Superintendent's division to another, such employees shall carry their seniority to the division to which transferred.

(k) Employees leaving the service after having been employed six months or more, will upon request, be given a certificate stating term of service and reason for leaving.

(m) An employee coming within the scope of this agreement, if displaced from regular position, must place himself [fol. 405] within ten (10) days of date of such displacement, otherwise he will revert to the extra list and be permitted to exercise seniority only in connection with any position that may be vacant. An employee is displaced when he is actually relieved by employee displacing him.

When an employee has been displaced by a senior man, he shall be notified promptly.

(n) Temporary vacancies which are known to be for more than thirty (30) days duration for other than agent or agent-operator, will be regularly advertised.

Temporary vacancies of sixty (60) days or over for agents or agent-operators included in this schedule, will be regularly advertised.

Rule 16

Typewriters

Typewriters will be furnished at offices where the railroad requires their use.

Rule 17

Distributing Schedules

The schedule of wages and working conditions shall be printed by the Railroad and each employee affected thereby shall be provided with a copy.

Rule 18

Reduction of Forces

In the event of a reduction in forces in positions covered by this schedule, the incumbents of the positions abolished [fol. 406] will have the right to any position covered by this schedule on the division where they are employed, which they are competent to fill, and the incumbents thereof are

their juniors in the service and will be given employment on other divisions, if qualified, in preference to persons not in the service.

Rule 19

Trading Positions

(a) Employees will not be allowed to trade positions, except in cases of emergency and with the permission of the proper authorities, and then for a period not exceeding ten days.

(b) Employees who hold a regular position and who bid in a season position, shall return to their former position when such season position is abolished.

Rule 20

Leave of Absence

(a) Employees who have been in the service of the Company for two years or more, may, on request, be given leave of absence, if relief men are available. Except for physical disability, leave of absence in excess of 90 days in any calendar year shall not be granted, unless by agreement between the management and duly accredited representatives of the employees.

(b) An employee who fails to report for duty at the expiration of leave of absence, shall be considered out of the service, except that when failure to report on time is the [fol. 407] result of unavoidable delay, the leave will be extended to include such delay.

Rule 21

Guarantees

Regularly assigned employees will receive one days' pay within each twenty-four (24) hours according to location occupied or to which entitled, if ready for service and not used, or if required on duty less than the required minimum number of hours as per location, except on Sundays and holidays.

Rule 22

Temporary Vacancies

Temporary vacancies, for other than Agent or Agent-Operator, of five (5) days or less will be filled by the first qualified available employe. Temporary vacancies in excess of five days will be filled by the senior extra employe applying for same.

Rule 23

Duration of Agreement

Rules and rates of pay as contained herein shall be continued in effect subject to thirty days' notice by either party.

For the Railroad: E. B. Moffatt, General Superintendent. For the Telegraphers: M. M. Farley, General Chairman.

(fol. 408)

PLAINTIFF'S EXHIBIT 1

Rates of Pay

Location	Position	Rate per hour
New York City— 90 West Street	Operator	81c 77c
Seranton Tel. Dept.	Wire Chief	79½c
M. & E. DIVISION		
New York Produce Exchange	Operator	71c
Hoboken Dispatcher's Clerk	Operator	67c
Dispatcher's Office	Operator	1st trick 78c 2nd trick 74c 3rd trick 74c
Information Bur.	"	1st trick 80c 2nd trick 76c 3rd trick 68c
Terminal Tower	Tower Director	1st trick 95c 2nd trick 95c 3rd trick 95c
"	"	90c
"	Leverman	1st trick 87c 2nd trick 87c 3rd trick 87c
"	" (2)	1st trick 87c 2nd trick 82½c 3rd trick 82½c
"	" (2)	1st trick 87c 2nd trick 82½c 3rd trick 82½c
Roundhouse	Leverman	1st trick 76c 2nd trick 76c 3rd trick 76c

PLAINTIFF'S EXHIBIT I—Continued

Location	Position	Rate per hour
Grove Street	Leverman	1st truck 82 ¹ / ₂ ¢
"	"	2nd truck 82 ¹ / ₂ ¢
"	"	3rd truck 82 ¹ / ₂ ¢
"	Operator	1st truck 73¢
"	"	2nd truck 73¢
(fol. 290)		
Henderson Street	Towerman	1st truck 65¢
"	"	2nd truck 65¢
"	"	3rd truck 65¢
West End	"	1st truck 82¢
"	"	2nd truck 82¢
"	"	3rd truck 80¢
"	Operator	1st truck 73¢
"	"	2nd truck 73¢
Hoboken Yard	"	75¢
Secaucus—E. End	Towerman	1st truck 69¢
"	"	2nd truck 69¢
"	"	3rd truck 69¢
" W. End	"	1st truck 70¢
"	"	2nd truck 70¢
"	"	3rd truck 70¢
Secaucus Jet	"	1st truck 64¢
"	"	2nd truck 64¢
"	"	3rd truck 64¢
Newark	"	1st truck 69 ¹ / ₂ ¢
"	"	2nd truck 69 ¹ / ₂ ¢
"	"	3rd truck 69 ¹ / ₂ ¢
Roseville Avenue	Towerman	1st truck 68 ¹ / ₂ ¢
"	"	2nd truck 68 ¹ / ₂ ¢
"	"	3rd truck 68 ¹ / ₂ ¢
Harrison	"	1st truck 65¢
"	"	2nd truck 65¢
"	"	3rd truck 65¢
Kearney Junction	"	1st truck 65¢
"	"	2nd truck 65¢
"	"	3rd truck 65¢
Bloomfield Pass	Agent Operator	70¢
Ampere Passenger	"	69¢
Watsessing	Agent	64¢
Glen Ridge	"	65¢
Montclair	Towerman	1st truck 67¢
"	"	2nd truck 67¢
"	"	3rd truck 67¢
Grove Street	Agent	68 ¹ / ₂ ¢
(fol. 410)		
Orange	Towerman	1st truck 67 ¹ / ₂ ¢
"	"	2nd truck 67 ¹ / ₂ ¢
"	"	3rd truck 67 ¹ / ₂ ¢
Highland Avenue	Agent	64 ¹ / ₂ ¢
Mountain Station	"	65¢
South Orange	Towerman	1st truck 71¢
"	"	2nd truck 71¢
"	"	3rd truck 71¢
Maplewood	Agent	67 ¹ / ₂ ¢
Elmhurst Passenger	"	64¢
"	Towerman	1st truck 67 ¹ / ₂ ¢
"	"	2nd truck 67 ¹ / ₂ ¢
"	"	3rd truck 67 ¹ / ₂ ¢

PLAINTIFF'S EXHIBIT 1—Continued

Location	Position	Rate per hour
Short Hills	Agent	63 ¹ / ₂ c
Murray Hill	Agent-Operator	63c
Summit Passenger		79 ¹ / ₂ c
" East End	Towerman	1st trick 68 ¹ / ₂ c
" " "	"	2nd trick 68 ¹ / ₂ c
" " "	"	3rd trick 68 ¹ / ₂ c
" West End	"	65 ¹ / ₂ c
New Providence	Agent	55c
Rockeley Heights		60c
Stirling	Agent-Operator	62 ¹ / ₂ c
Millington		66 ¹ / ₂ c
Lyons	Agent	55c
Basking Ridge	Agent-Operator	62c
Bernardsville	Clerk-Operator	66c
Far Hills	Agent-Operator	60 ¹ / ₂ c
Peapack	"	60c
Gladstone	"	62c
	Clerk-Operator	60c
Chatham Passenger	Agent	63c
Convent	Agent-Operator	63c
Morristown	Clerk-Operator	65c
" "	Towerman	1st trick 65c
" "	"	2nd trick 65c
" "	"	3rd trick 65c
Morris Plains	Agent-Operator	66 ¹ / ₂ c
[fol. 411]		
Mount Tabor	Agent-Operator	59c
Denville	Agent	60 ¹ / ₂ c
" "	Towerman	1st trick 73c
" "	"	2nd trick 73c
" "	"	3rd trick 73c
Rockaway	Agent-Operator	63 ¹ / ₂ c
Dover	Towerman	1st trick 72c
" "	"	2nd trick 72c
" "	"	3rd trick 72c
Succasunna	Agent	61c
Chester	Agent-Operator	58c
Chester-Junction	Towerman	1st trick 66c
" "	"	2nd trick 66c
" "	"	3rd trick 66c
Hopatecong	Agent-Operator	71c
Netcong	Clerk-Operator	63c
Port Murray	Agent-Operator	63 ¹ / ₂ c
Hackettstown		67c
Washington	Towerman	1st trick 69c
" "	"	2nd trick 69c
" "	"	3rd trick 69c
Stewartsville	Agent	61c
Lyndhurst	"	62 ¹ / ₂ c
Delawanna	"	65 ¹ / ₂ c
Passaic	Agent-Operator	68 ¹ / ₂ c
" "	Towerman	1st trick 67 ¹ / ₂ c
" "	"	2nd trick 67 ¹ / ₂ c
" "	"	3rd trick 67 ¹ / ₂ c
Paterson Passenger	Clerk-Operator	65c
Paterson Junction	Towerman	1st trick 67c
" "	"	2nd trick 67c
" "	"	3rd trick 67c

PLAINTIFF'S EXHIBIT I—Continued

Location	Position	Rate per hour
Little Falls	Agent	63 ¹ / ₂ c
Mountain View		62 ¹ / ₂ c
"	Towerman	1st trick 65c
"	"	2nd trick 65c
"	"	3rd trick 65c
[fol. 412]		
Lincoln Park	Agent-Operator	63c
"	Towerman	1st trick 70 ¹ / ₂ c
"	"	2nd trick 70 ¹ / ₂ c
"	"	3rd trick 70 ¹ / ₂ c
Towaco	Agent	59c
Boonton	Agent-Operator	70 ¹ / ₂ c
"	Clerk-Operator	59c
"	Towerman	1st trick 68 ¹ / ₂ c
"	"	2nd trick 68 ¹ / ₂ c
"	"	3rd trick 68 ¹ / ₂ c
Mountain Lakes	Agent	59 ¹ / ₂ c
Mount Arlington	"	60 ¹ / ₂ c
Andover	Agent-Operator	61c
Branchville	"	63 ¹ / ₂ c
Franklin	"	65 ¹ / ₂ c
Franklin	Clerk-Operator	61c
Branchville Jct.	Agent-Operator	59c
Lafayette	Agent	57 ¹ / ₂ c
Newton Ticket	Agent-Operator	65c
Greendell	Agent	60c
"	Towerman	1st trick 66c
"	"	2nd trick 66c
"	"	3rd trick 66c
Johnsonburg	Agent-Operator	63 ¹ / ₂ c
Blairstown	"	65c
East Dover Junc.	Towerman	1st trick 68c
"	"	2nd trick 68c
"	"	3rd trick 68c
Port Morris—East	Towerman	1st trick 75c
"	"	2nd trick 75c
"	"	3rd trick 75c
Port Morris—West	Towerman	1st trick 70c
"	"	2nd trick 70c
"	"	3rd trick 70c
Port Morris Yard	Operator	67c
Relief Agent	M. & E. Division	62 ¹ / ₂ c
"	Towerman	73 ¹ / ₂ c
"	"	72c
Broadway	Agent	75.00 per mo.
[fol. 413]		
Slateford Junction	Towerman	1st trick 68 ¹ / ₂ c
"	"	2nd trick 68 ¹ / ₂ c
"	"	3rd trick 68 ¹ / ₂ c
Portland	Towerman	1st trick 66c
"	"	2nd trick 66c
"	"	3rd trick 66c
Delaware	Agent-Operator	68c
Manunka Chunk	Towerman	1st trick 68c
"	"	2nd trick 68c
"	"	3rd trick 66 ¹ / ₂ c
Bridgeville	Agent-Operator	65c
Oxford Furnace	Clerk-Operator	67c

PLAINTIFF'S EXHIBIT 1—Continued

Location	Position	Rate per hour
Water Gap	Agent-Operator	71c
Stroudsburg	Towerman	1st trick 69 ¹ / ₂ c
"	"	2nd trick 69 ¹ / ₂ c
"	"	3rd trick 69 ¹ / ₂ c
Stroudsburg	Agent-Operator	71 ¹ / ₂ c
Gravel Place	Clerk-Operator	65 ¹ / ₂ c
"	Towerman	1st trick 68 ¹ / ₂ c
"	"	2nd trick 68 ¹ / ₂ c
"	"	3rd trick 68 ¹ / ₂ c
Anaheim	Agent-Operator	67c
"	Towerman	1st trick 67 ¹ / ₂ c
"	"	2nd trick 67 ¹ / ₂ c
"	"	3rd trick 67 ¹ / ₂ c
Henryville	Agent-Operator	64c
West Henryville	Towerman	1st trick 67 ¹ / ₂ c
"	"	2nd trick 67 ¹ / ₂ c
"	"	3rd trick 67 ¹ / ₂ c
Cresco	Agent-Operator	66c
"	Clerk-Operator	65c
Mount Pocono	Agent-Operator	66c
"	Clerk-Operator	65c
"	Towerman	1st trick 67 ¹ / ₂ c
"	"	2nd trick 67 ¹ / ₂ c
"	"	3rd trick 67 ¹ / ₂ c
[fol. 414]		
Pocono Summit	Agent-Operator	63c
"	Towerman	1st trick 67 ¹ / ₂ c
"	"	2nd trick 67 ¹ / ₂ c
"	"	3rd trick 67 ¹ / ₂ c
Tobyhanna	Agent-Operator	68c
"	Towerman	1st trick 68c
"	"	2nd trick 68c
"	"	3rd trick 68c
Gouldsboro	Agent-Operator	66c
"	Towerman	1st trick 69c
"	"	2nd trick 69c
"	"	3rd trick 69c
Lehigh	Towerman	1st trick 67 ¹ / ₂ c
"	"	2nd trick 67 ¹ / ₂ c
"	"	3rd trick 67 ¹ / ₂ c
Moscow	Agent-Operator	65c
"	Clerk-Operator	64c
Elmhurst	Agent-Operator	66c
Nay Aug	Towerman	1st trick 67 ¹ / ₂ c
"	"	2nd trick 67 ¹ / ₂ c
"	"	3rd trick 67 ¹ / ₂ c
Scranton	Operator	79c
Manager	"	1st trick 75c
"Z" Office	"	2nd trick 75c
"	"	73c
Dispatcher's Clerk	Clerk-Operator	1st trick 80c
Bridge 60	Tower Director	2nd trick 80c
"	"	3rd trick 80c
"	Towerman	1st trick 77c
"	"	2nd trick 77c
"	"	3rd trick 77c

PLAINTIFF'S EXHIBIT 1 - Continued

Location	Position	Rate per hour
Mattie Street	Towerman	1st trick 72c
•	•	2nd trick 72c
•	•	3rd trick 72c
East End	Towerman	1st trick 67 1/2c
•	•	2nd trick 67 1/2c
•	•	3rd trick 67 1/2c
[fol. 415]		
Yard	Operator	1st trick 67c
•	•	2nd trick 67c
•	•	3rd trick 67c
Cayuga	Towerman	1st trick 67 1/2c
•	•	2nd trick 67 1/2c
•	•	3rd trick 67 1/2c
Clark's Summit	Clerk-Operator	65c
•	Towerman	1st trick 67 1/2c
•	•	2nd trick 67 1/2c
•	•	3rd trick 67 1/2c
Glenburn	Agent-Operator	66c
Dalton	Agent-Operator	67c
La Plume	Agent-Operator	65c
Factoryville	Agent-Operator	65c
•	Towerman	1st trick 67 1/2c
•	•	2nd trick 67 1/2c
•	•	3rd trick 67 1/2c
Nicholson	Agent	67c
Foster	Agent-Operator	67c
Kingsley	Agent-Operator	65c
•	Towerman	1st trick 67 1/2c
•	•	2nd trick 67 1/2c
•	•	3rd trick 67 1/2c
Alford	Towerman	1st trick 67 1/2c
•	•	2nd trick 67 1/2c
•	•	3rd trick 67 1/2c
New Milford	Agent-Operator	66 1/2c
•	Towerman	1st trick 67 1/2c
•	•	2nd trick 67 1/2c
•	•	3rd trick 67 1/2c
Hallstead	Agent-Operator	68c
•	Oper. - Towerman	1st trick 67 1/2c
•	•	2nd trick 67 1/2c
•	•	3rd trick 67 1/2c
Montrose	Oper. - Towerman	67 1/2c
Conklin	Agent-Operator	75 1/2c
Johnson City	Agent-Operator	66 1/2c
Vestal	Clerk-Operator	65c
•	•	1st trick 65c
•	•	2nd trick 65c
•	•	3rd trick 65c
[fol. 416]		
Apalachin	Agent-Operator	64c
•	Clerk-Operator	65c
Owego	•	2nd trick 67c
•	•	1st trick 67c
•	•	3rd trick 67c
Nichols	Clerk-Operator	1st trick 65 1/2c
•	•	2nd trick 65 1/2c
•	•	1st trick 66c
Waverly	Clerk-Operator	2nd trick 66c
•	•	3rd trick 66c
•	•	•

PLAINTIFF'S EXHIBIT 1—Continued

Location	Position	Rate per hour
Lowman	Agent-Operator	62 1/2c
Wilseyville	"	61c
Candor	"	64c
Ithaca	Clerk-Operator (2)	66c
Taylor	Agent-Operator	70c
"	Clerk-Operator	65c
Old Forge	Agent-Operator	70 1/2c
Duryea	Agent-Operator	67c
Susquehanna Ave.	Agent	56c
West Pittston	Agent-Operator	73c
Wyoming	Agent-Operator	68 1/2c
Kingston	Clerk-Operator	65c
"	Operator	1st trick 65c
"	"	2nd trick 65c
Plymouth Junction	Towerman	1st trick 65c
"	"	2nd trick 65c
"	"	3rd trick 65c
Plymouth	Clerk-Operator	68c
West Nanticoke	Agent-Operator	67 1/2c
Hunlocks	Agent-Operator	65c
Shickshinny	Agent-Operator	65 1/2c
"	Clerk-Operator	63 1/2c
Berwick	Clerk-Operator	70c
Lime Ridge	Agent-Operator	62 1/2c
Bloomsburg	Clerk-Operator (2)	68c
"	Clerk-Operator	66 1/2c
Danville	Clerk-Operator	67 1/2c
Northumberland	Clerk-Operator (2)	69c
Scranton Div.	Relief Agent	62 1/2c
[fol. 417]		
BUFFALO DIVISION		
Elmira	Clerk-Operator	1st trick 66c
"	"	2nd trick 65c
"	"	3rd trick 65c
Elmira Heights	Agent-Operator	65c
Elmira Yard	Operator	1st trick 69c
"	"	2nd trick 69c
"	"	3rd trick 69c
"	Towerman	1st trick 66c
"	"	2nd trick 66c
"	"	3rd trick 66c
Horseheads	Agent-Operator	63c
Hig Flats	Agent-Operator	63c
Corning Freight	Clerk-Clerk-Operator	63c
Corning Passengers	Agent-Operator	66c
"	Clerk-Operator	65c
"	"	61c
Painted Post	Agent	64c
Coopers	Agent-Operator	62c
"	Towerman	1st trick 61c
"	"	2nd trick 61c
"	"	3rd trick 61c
Campbells	Agent-Operator	65c
Savona	Agent-Operator	63c
Bath	Clerk-Operator	1st trick 65 1/2c
"	"	2nd trick 63 1/2c
"	"	3rd trick 63 1/2c
Kanona	Agent-Operator	61c
Avoca	Agent-Operator	65 1/2c
"	Clerk-Operator	64 1/2c

BUFFALO DIVISION—Continued

Location	Position	Rate per hour
Wallace	Agent-Operator	62c
Cohocton	Agent-Operator	67 1/2c
	Clerk-Operator	62 1/2c
Atlanta	Agent-Operator	63 1/2c
Wayland	Towerman	1st trick 67 1/2c
		2nd trick 67 1/2c
		3rd trick 67 1/2c
Portway	Agent-Operator	62 1/2c
[fol. 418]		
Dansville	Clerk-Operator	1st trick 64 1/2c
		2nd trick 64 1/2c
		3rd trick 64 1/2c
Groveland	Towerman	1st trick 66 1/2c
		2nd trick 66 1/2c
		3rd trick 66 1/2c
Mount Morris	Clerk-Operator	1st trick 64 1/2c
		2nd trick 64 1/2c
		3rd trick 64 1/2c
Mount Morris—Erie	Towerman	1st trick 61c
		2nd trick 61c
		3rd trick 61c
Mt. Morris—P. R. R.	Towerman	1st trick 64c
		2nd trick 64c
		3rd trick 64c
Leicester	Agent-Operator	64c
Greigsville	Agent-Operator	71c
Craigs	Agent-Operator	64 1/2c
Linwood	Agent-Operator	65c
B. R. & P. Jct.	Operator	1st trick 64 1/2c
		2nd trick 64 1/2c
		3rd trick 64 1/2c
East Bethany	Agent-Operator	68c
Alexander	Agent-Operator	64c
	Operator	2nd trick 64c
		3rd trick 64c
North Darien	Agent-Operator	61c
Fargo	Agent-Operator	64c
Lancaster	Clerk-Operator	64c
Buffalo—		
Dispatchers	Operators	1st trick 75c
		2nd trick 75c
		3rd trick 75c
Michigan Ave.	Towerman	1st trick 68c
		2nd trick 68c
		3rd trick 68c
River Draw	Towerman	1st trick 68c
		2nd trick 68c
		3rd trick 68c
[fol. 419]		
Yard	Operator	1st trick 71c
		2nd trick 71c
		3rd trick 71c
Buffalo Yard	Towerman	1st trick 69c
		2nd trick 69c
		3rd trick 69c

S. & U. DIVISION

Location	Position	Rate per hour
Binghamton W. F. Office	Operator	76 ¹ / ₂ c
"	"	75c
"	"	1st trick 71 ¹ / ₂ c
"	"	2nd trick 71 ¹ / ₂ c
Yard	Operator	1st trick 68c
"	"	2nd trick 67c
"	"	3rd trick 67c
B. Y. Tower	Towerman	1st trick 72 ¹ / ₂ c
"	"	2nd trick 72 ¹ / ₂ c
"	"	3rd trick 72 ¹ / ₂ c
R. D. Tower	Towerman	1st trick 67 ¹ / ₂ c
"	"	2nd trick 67 ¹ / ₂ c
"	"	3rd trick 67 ¹ / ₂ c
Syracuse Yard	Operator	1st trick 67 ¹ / ₂ c
"	"	2nd trick 67 ¹ / ₂ c
"	"	3rd trick 67 ¹ / ₂ c
Syracuse Tower	Leverman	1st trick 65c
"	"	2nd trick 65c
"	"	3rd trick 65c
Syracuse Pass.	Agent-Operator	81 ¹ / ₂ c
"	Clerk-Operator	76c
"	Operator	67c
Syracuse	Operator	63c
Brighton Ave.	Agent-Operator	62c
Oswego	Agent-Operator	65 ¹ / ₂ c
Minetto	Clerk-Operator	65c
Fulton	Agent-Operator	65c
Lamson	Agent-Operator	65c
Baldwinsville	Clerk-Operator	65c
[fol. 420]		
Jamestown	Clerk-Operator	1st trick 68c
"	Clerk-Operator	2nd trick 68c
"	Operator-Sw. T. C.	3rd trick 67c
Onondaga	Agent-Operator	64c
"	Clerk-Operator	1st trick 64c
"	"	2nd trick 61 ¹ / ₂ c
Apulia	Agent-Operator	65 ¹ / ₂ c
"	Clerk-Operator	2nd trick 63c
"	"	3rd trick 61c
Tully	Clerk-Operator	1st trick 65c
"	"	2nd trick 63c
Preble	Agent-Operator	60c
Little York	"	61c
Homer	Clerk-Operator	65 ¹ / ₂ c
Cortland Pass.	Agent	74 ¹ / ₂ c
"	Clerk-Operator	1st trick 67 ¹ / ₂ c
"	"	2nd trick 67 ¹ / ₂ c
"	"	3rd trick 67 ¹ / ₂ c
Blodgett	Agent-Operator	60 ¹ / ₂ c
Messengerville	Agent-Operator	60 ¹ / ₂ c
Marathon	Clerk-Operator	1st trick 64 ¹ / ₂ c
"	"	2nd trick 64 ¹ / ₂ c
"	"	3rd trick 64 ¹ / ₂ c
Killawog	Agent-Operator	62c
Lisle	Agent-Operator	62c
Whitney Point	Clerk-Operator	1st trick 64 ¹ / ₂ c
"	"	2nd trick 64 ¹ / ₂ c
Chenango Forks	Agent-Operator	60 ¹ / ₂ c

S. & U. DIVISION—Continued

Location	Position	Rate per hour
	Towerman	1st trick 67c
	"	2nd trick 67c
	"	3rd trick 67c
Chenango Bridge	Agent-Operator	64c
McGraw	Agent-Operator	60c
East Freetown	Agent	\$95.00
Gee Brook	Agent	54c
Cincinnati	Agent-Operator	61c
Utica	Clerk-Operator	1st trick 66 1/2c
"	"	2nd trick 66 1/2c
"	"	3rd trick 66 1/2c
[fol. 421]		
New Hartford	Agent-Operator	72c
Washington Mills	Agent-Operator	60c
Chadwick	Clerk-Operator	1st trick 65c
		2nd trick 64c
Sauquoit	Agent-Operator	68c
Clayville	Agent-Operator	71c
Richfield Junction	Agent-Operator	66c
	Clerk-Operator	63 1/2c
Paris	Agent-Operator	64c
Waterville	Clerk-Operator	1st trick 65c
		2nd trick 65c
North Brookfield	Agent-Operator	64 1/2c
Hubbardsville	Agent-Operator	63c
Poolville	Agent-Operator	67c
Earlville	Agent-Operator	66c
Sherburne	Clerk-Operator	1st trick 65c
		2nd trick 65c
Galena	Agent-Operator	63c
Norwich	Clerk-Operator	69c
"	"	1st trick 66c
		2nd trick 66c
Oxford	Clerk-Operator	65c
Hrsten	Agent-Operator	65c
Greene	Clerk-Operator	65c
Bridgewater	Agent-Operator	63 1/2c
West Winfield	Agent-Operator	63 1/2c
Cedarville	"	61c
Richfield Springs	"	78c
	Clerk	65c
B. & P. Division		
Pen Argyl	Clerk-Operator	62c
Nazareth	"	62c

The Delaware, Lackawanna and Western Railroad Company

RULES AND WORKING CONDITIONS FOR CLERICAL FORCES, OCTOBER 1ST, 1934

Agreement between The Delaware, Lackawanna and Western Railroad Company, and the Association of Clerical Forces of the Lackawanna Railroad, representing the clerical forces of said Railroad Company.

Article I

Scope

Effective October 1, 1934, the following Rules and Working Conditions shall apply to the clerical forces employed by the Delaware, Lackawanna and Western Railroad Company.

The clerical forces covered by these rules consist of employees who regularly devote not less than four hours per day to the writing and calculating incident to keeping records and accounts, rendition of bills, reports and statements, handling of correspondence, operation of office mechanical [fol. 423] equipment and devices in connection with such work, with the following exceptions:

Entire Force—Office of the President.

Entire Force—Office of Vice President and General Counsel.

Entire Force—Office of Vice President and General Manager.

Entire Force—Office of Secretary and Treasurer.

Personal office staff (Chief Clerk and personal stenographer) of officers in rank equal to or above Trainmasters, Division Engineer, or Master Mechanic.

Supervisory Agents at—

Produce Exchange, New York City

Hoboken City

Piers 13, 41, 68 and 26, New York City

New York Transfer

Newark Freight Station

Seranton Freight Station

Binghamton Freight Station

Elmira Freight Station
 Buffalo Freight Station
 Syracuse Freight Station
 Cortland Freight Station
 Utica Freight Station

Employees assigned to road service such as Traveling Auditors, Car Agents, Storekeepers, Paymasters and Inspectors where special training, experience and fitness are necessary.

[fol. 424] Train announcers, gatemen, baggage and parcel room employees (except clerks), train and engine crew callers, telephone switchboard operators, elevator operators and station attendants, attendant or stockkeeper at oil houses and storehouses.

Employees not classified above, whose duties are of a direct and confidential nature as may be agreed upon between the Management and Representatives of the Clerks' Organization.

Article 2

Basis of Pay

(a) Except as otherwise provided, eight (8) hours, exclusive of meal period, shall constitute a day's work.

(b) Nothing herein shall be construed to permit the reduction of existing six day assignments excepting that this number may be reduced in a week in which holidays occur by the number of such holidays.

Article 3

Intermittent Service

Where service is intermittent, eight (8) hours' actual time on duty within a spread of twelve (12) hours shall constitute a day's work. Employees filling such positions shall be paid overtime for all time actually on duty or held for duty in excess of eight (8) hours from the time required to report for duty to the time of release within twelve (12) [fol. 425] consecutive hours, and also for all time in excess of twelve (12) consecutive hours computed continuously from the time first required to report until final release. Time shall be counted as continuous service in all cases.

where the interval of release from duty does not exceed one (1) hour.

Exceptions to the foregoing paragraph shall be made for individual positions when agreed to between the Management and duly accredited representatives of the employees. For such excepted positions the foregoing paragraph shall not apply.

This rule shall not be construed as authorizing the working of split tricks where continuous service is required.

Intermittent service is understood to mean service of a character where during the hours of assignment there is no work to be performed for periods of more than one (1) hour's duration and service of the employees cannot otherwise be utilized.

Employees covered by this rule will be paid not less than eight (8) hours within a spread of twelve (12) consecutive hours.

Article 4

Meal Period

(a) Unless agreed to by a majority of employees in a department or sub-division thereof, the meal period shall be not less than thirty (30) minutes, nor more than one hour.

[fo] 426] (b) For regular operations requiring continuous hours, eight (8) consecutive hours without meal period may be assigned as constituting a day's work, in which case not to exceed twenty (20) minutes shall be allowed in which to eat, without deduction in pay, when the nature of the work permits.

(c) When a meal period is allowed, it will be between the ending of the fourth hour and beginning of the seventh hour after starting work, unless otherwise agreed upon.

(d) If the meal period is not afforded within the allowed or agreed time limit and is worked, the meal period shall be paid for at the pro rata rate and twenty (20) minutes, with pay, in which to eat shall be afforded at the first opportunity.

Article 5

Starting Time

(a) Regular assignments shall have a fixed starting time and the regular starting time shall not be changed

without at least twenty-four (24) hours notice to the employees affected.

(b) When the established starting time of a regular position is changed more than one hour for more than six consecutive days, the employees affected may, within ten days thereafter, upon thirty-six (36) hours advance notice, exercise their seniority rights to any position held by a junior employee. Other employees affected, may exercise their seniority in the same manner.

[fol. 427]

Article 6

Three Shift Positions

Where three consecutive shifts are worked covering the 24-hour period no shift will have a starting time after 12 o'clock midnight and before 5:00 a. m.

Article 7

Overtime and Calls

(a) Except as otherwise provided in these rules, time in excess of eight (8) hours, exclusive of meal period, on any day will be considered overtime.

(b) For daily rated employees except as otherwise provided in these rules, when the full number of hours per week have been worked (produced by multiplying by eight the days of the weekly assignment), overtime will be computed at the rate of time and one-half. When the total hours worked in regular assignment do not equal the number of hours so produced, overtime will be computed pro rata until the weekly period is fulfilled; thereafter overtime will be computed at rate of time and one-half time.

(c) Where it has been the practice to let employees off for a part of the eight hour day on certain days of the week, such practice shall not be rescinded and shall not be departed from except in case of emergency.

(d) Except as otherwise provided in these rules, employees notified or called to perform work not continuous [fol. 428] with the regular work period will be allowed a minimum of three (3) hours for two (2) hours work or less

and if held on duty in excess of two (2) hours, time and one-half time will be allowed on the minute basis.

(e) Employees will be allowed time and one-half time on the minute basis for service performed continuous with and in advance of regular work period.

(f) Employees who have completed their work period for the day and been released from duty required to return for further service may, if conditions justify, be paid as if on continuous duty.

(g) Employees will not be required to suspend work during regular hours to absorb overtime.

(h) No overtime hours will be worked except by direction of proper authority, or in case of emergency when advance authority is not obtainable.

Article 8

Sunday and Holiday Work

(a) Work performed on Sundays and the following legal holidays namely, New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas (provided when any of the above holidays fall on Sunday, the day observed by the State, Nation, or by proclamation shall be considered the holiday), shall [fol. 429] be paid at the rate of time and one-half, except that employees necessary to the continuous operation of the carrier and who are regularly assigned to such service will be assigned one regular day off duty in seven, Sunday if possible, and if required to work on such regularly assigned seventh day off duty will be paid at the rate of time and one-half; when such assigned day off duty is not Sunday, work on Sunday will be paid for at straight-time rate.

(b) When an agreement or practice more favorable to the employee is in effect, such agreement or practice may be retained.

Article 9

Seniority

(a) Seniority begins at the time employee's pay starts in the seniority district and in the class covered by these rules.

(b) Employees covered by these rules shall be in line for promotion. Promotion shall be based on seniority, fitness and ability. Fitness and ability being sufficient, in the judgment of the management, seniority shall prevail.

(c) Seniority districts now established shall be continued unless and until changed by mutual agreement.

(d) Seniority rosters of employees in each district and in each department shall be revised as of January 1st each year and posted in agreed upon places accessible to those [fol. 430] affected and a copy furnished to the General Committee of the employees.

(e) Employees transferring with their positions from one seniority district to another, shall retain their positions and shall rank from date of transfer in the seniority district to which transferred.

(f) When, for any reason, two or more offices or departments are consolidated, employees affected shall have prior rights to corresponding positions in the consolidated office or department. After such rights have been exercised, these rules shall govern.

(g) Employees whose positions are abolished may exercise their seniority rights over junior employees. Other employees affected may exercise their seniority in the same manner.

(h) Employees filing applications for positions bulletined in other districts, will, if they possess sufficient fitness and ability, be given preference over non-employees.

Article 10

New Positions and Vacancies

(a) New positions or vacancies will be promptly bulletined in agreed upon places accessible to all employees affected, for five days in the respective districts where

they occur; bulletin to show location, title, hours of service and rate of pay. Employees desiring such position will file their applications with the designated official within [fol. 431] that time and an assignment will be made within five days thereafter. The name of the successful applicant will, immediately thereafter, be posted for a period of five days where the position was bulletined.

(b) When more than one vacancy or new position exists, employees may bid on any or all, stating preference.

(c) Employees declining promotions or declining to bid for a bulletined position, shall not lose their seniority.

(d) Employees awarded bulletined positions will be allowed a reasonable time in which to qualify, and, failing, shall retain their seniority rights, may bid on any bulletined position, but may not displace any regularly assigned employee.

(e) When an employee bids for and is awarded a permanent position, his former position will be declared vacant and bulletined.

(f) Bulletined positions may be filled temporarily pending an assignment, and in event no applications are received, may be permanently filled without regard to these rules.

(g) Positions or vacancies of thirty days or less duration shall be considered temporary and may be filled without bulletining; if known to be of more than thirty days duration they shall be bulletined according to these rules. A position or vacancy of indefinite duration need not be bulletined until the expiration of thirty days from the [fol. 432] date when such position is created or vacancy occurs.

(h) An employee returning after leave of absence may return to former position, or may, upon return or within three days thereafter, exercise seniority rights to any positions bulletined during such absence. Employees displaced by his return may exercise their seniority in the same manner.

Article 11

Reducing Forces

When reducing forces seniority rights shall govern. When forces are increased, former employes will be returned to service in the order of their seniority rights. If they desire to avail themselves of this rule, they must file their addresses with the proper official at time of reduction, advise promptly of any change in address and renew address each ninety (90) days. If they fail to renew their address each ninety (90) days or to return to the service within (7) days after being notified (by mail or telegram sent to the address last given) or to give satisfactory reason for not doing so, they will not be entitled to the benefits of this rule.

Article 12

Discipline and Grievances

(a) No employe shall be disciplined without a fair hearing by a designated officer of the Railroad Company. Suspension [fol. 433] pension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, the employe shall be apprised of the precise charge against him and shall have reasonable opportunity to secure the presence of necessary witnesses and shall have the right to be represented at the hearing by the representatives of his choosing.

If the judgment shall be in the employe's favor, he (or she) shall be compensated for any loss of wages.

(b) The management accords to employes the right to appeal to its highest officers.

Article 13

Leave of Absence

(a) Except for physical disability, leave of absence in excess of ninety (90) days in any one calendar year shall not be granted, unless by agreement between the management and the General Committee of the employes.

(b) An employe who fails to report for duty at the expiration of leave of absence shall be considered out of

service, except that when failure to report on time is the result of unavoidable delay, the leave will be extended to include such delay.

(c) Employees temporarily assigned to organization matters or elected as representatives of employees shall retain their seniority rights.

[fol. 434]

Article 14

Re-entering Service

Employees voluntarily leaving the service will, if they re-enter, be considered new employees.

Article 15

Official Positions

Employees now filling or promoted to excepted or official positions shall retain their rights and continue to accumulate seniority in the district from which promoted, but this shall not apply to employees promoted from classes not covered by these rules.

If such employees are demoted through no fault of their own by reason of discontinuance of position, consolidation of departments or otherwise, seniority rules will apply as in reducing forces.

Article 16

Attending Court

Employees attending Court or appearing as witnesses for the Railroad will be furnished transportation and allowed their regular wages and necessary expense which away from headquarters. Any fee or mileage accruing will be assigned to the Railroad Company.

Article 17

Positions

Positions (not employees) shall be rated and the transfer of rates from one position to another shall not be permitted.

[fol. 435]

Article 18

Preservation of Rates

Employees temporarily or permanently assigned to higher rated positions shall receive the higher rates while occupying such position; employees temporarily assigned to lower rated positions shall not have their rates reduced.

A "temporary assignment" contemplates the fulfillment of the duties and responsibilities of the position during the time occupied, whether the regular occupant of the position is absent or whether the temporary assignee does the work irrespective of the presence of the regular employee. Assisting a higher rated employee because of a temporary increase in the volume of work does not constitute a temporary assignment.

Article 19

Women

The pay of women employees for the same class of work shall be the same as that of men.

Article 20

New Positions

The wages for new positions shall be in conformity with the wages for positions of similar kinds or class in the seniority district where created.

[fol. 436]

Article 21

Vacations

(a) Clerical employees having one year and less than three years service in the classification covered by these rules, shall be entitled to ten working days vacation per year (not necessarily continuous) without loss of pay, and such employees having three years service or over in said classification shall be entitled to twelve working days vacation per year (not necessarily continuous) without loss of pay; provided that such vacations will not cause undue impairment of the service or additional expense to the Railroad Company.

(b) Absence of a clerk from work on account of sickness or otherwise may be charged to the vacation allowance, subject to the judgment of the head of the department.

(c) Where an agreement or practice more favorable to the employes is in effect, such agreement or practice insofar as it relates to this rule, shall be retained.

Article 22

Incapacitated Employes

Effort will be made to furnish employment (suited to their capacity) to employes who have become physically unable to continue in their present positions.

[fol. 437]

Article 23

Bond Premiums

Employes shall not be required to pay premiums on bonds required by the Railroad Company in handling its business.

Article 24

Typewriters

Typewriters and other office equipment devices will be furnished by the Railroad Company at offices where the management requires their use.

Article 25

Evasion of Rules or Rates

Established positions shall not be discontinued and new ones created under a different title covering relatively the same class of work for the purpose of reducing the rate of pay or evading the application of these rules.

Article 26

Effective Date

This agreement shall be effective October 1st, 1934, and shall remain in effect for a period of one year, and thereafter unless and until terminated by thirty-days written notice, given by either party to the other.

The Delaware, Lackawanna and Western R. R. Co.,
E. B. Moffatt, General Superintendent. Associa-
[fol. 438] tion of Clerical Forces of the Lackawanna
Railroad. H. W. Schultz, General Chairman.

Members of General Committee

J. F. Heffernan
Bartlett F. Dunan
S. M. Ansted
M. A. Storm
W. J. Syring

H. J. Mullaghy
J. F. Sullivan
A. W. Wild
F. H. Canny
P. J. Rogers

PLAINTIFF'S EXHIBIT 6

Agreement

Between the Delaware, Lackawanna and Western Railroad
and the Brotherhood of Railway and Steamship Clerks,
Freight Handlers, Express and Station Employees

Effective January 1, 1939

Article I—Scope

Employees Affected

Rule 1. These Rules shall govern the hours of service [fol. 439] and working conditions of the following employees, subject to exceptions noted below:

Group 1.—Clerks (Including train and engine crew callers).

Group 2.—Other office, stores and station employees such as:

(a) Office Boys, Messengers, Train Announcers, Gatemen, Baggage and Parcel Room Employees, Station Helpers, Telephone Switchboard Operators, Elevator Operators, Office or Station Watchmen (not having police authority), Janitors, Matrons, Porters, Ticket Assorters, Waybill Assorters, Operators of Office and Station equipment appliances and devices not requiring clerical ability, and those operating machines for perforating and addressing envelopes, numbering claims, or other papers, and those engaged in work of a similar character.

(b) Station, office and freight car cleaners, freight handlers, such as Truckmen, Stowmen, Locators, Floormen, Sealers, Sealers, Coopers, etc., Storeroom and Stockroom Truckers, laborers employed in and around stations, store-

houses and warehouses and others doing work of a similar character.

Exceptions. These rules, except as otherwise specified, shall not apply to the personal office force positions as indicated on "Personal Office Force List #1".

New positions or reclassifications of existing positions [fol. 440] shall be subject to conference between the Management and the General Chairman for the purpose of determining whether such positions shall be excepted. In filling appointive positions, (those which are not required to be advertised) in other than entirely excepted offices, full consideration shall be given to senior qualified employees coming under the provisions of this agreement.

Except by agreement, existing schedule positions shall not be transferred to, or new positions taking over the duties of employees covered by this agreement be established in entirely excepted offices.

These rules shall not apply to laborers on coal and ore docks; or to laborers on elevators, piers, wharves, or other water front facilities not a part of the regular freight station forces; or to individuals where amounts of thirty-five dollars per month or less are paid for special services which take only a portion of their time from outside employment or business; or to individuals performing personal service not a part of the duty of the carrier.

Definition of Clerk

Rule 2. Clerical workers—employees who regularly devote not less than four (4) hours per day to the writing and calculating incident to keeping records and accounts, rendition of bills, reports and statements, handling of correspondence and similar work.

[fol. 441] *Machine Operators*—employees who regularly devote not less than four (4) hours per day to the operation of office or station mechanical equipment requiring special skill and training, such as typewriters, calculating machines, bookbinding machines, dictaphones and other similar equipment.

Article II—Basic Day, Overtime, Meal Period, Starting Time

Basic Day

Rule 3. (a) Except as otherwise provided, eight (8) consecutive hours, exclusive of the meal period shall constitute a day's work.

Intermittent Service

(b) Where service is intermittent, eight (8) hours' actual time on duty within a spread of twelve (12) hours shall constitute a day's work. Employees filling such positions shall be paid overtime for all time actually on duty or held for duty in excess of eight (8) hours from the time required to report for duty to the time of release within twelve (12) consecutive hours, and also for all time in excess of twelve (12) consecutive hours computed continuously from the time first required to report until final release. Time shall be counted as continuous service in all cases where the interval of release from duty does not exceed one (1) hour.

Exceptions to the foregoing paragraph shall be made for [fol. 442] individual positions when agreed to between the Management and duly accredited representatives of the employees. For such excepted positions the foregoing paragraph shall not apply.

This rule shall not be construed as authorizing the working of split tricks where continuous service is required.

Intermittent service is understood to mean service of a character where during the hours of assignment there is no work to be performed for periods of more than one (1) hour's duration and service of the employees cannot otherwise be utilized.

Employees covered by this rule will be paid not less than eight (8) hours within a spread of twelve (12) consecutive hours.

Overtime

(c) Except as otherwise provided time in excess of eight (8) hours exclusive of meal period, on any day, will be considered overtime and paid on the actual minute basis at the rate of time and one-half.

Freight House and Platform Forces

(d) Paragraphs (a) and (b) of this rule apply only to regularly assigned employees, and not to extra or part time employees at pier stations, freight stations, transfer platforms or other places where fluctuations of tonnage govern employment according to service requirements.

At these points the minimum number of eight hour plat-[fol. 443] form positions worked any day of the preceding month will be considered as establishing the number of regularly assigned positions for the current month, such positions to be known as regularly established platform force, except, however, that this number may be reduced, if necessity should arise, by posting notice of the positions not required, the remaining number of positions to be known as the regular established platform force.

Additional platform forces may be worked as necessary and will be given consideration to secure maximum service hours (up to 8) on days they perform service but if used for a lesser period than 8 hours on any day they will be paid for actual time worked with a minimum of four hours at pro rata rate.

Starting Time

Rule 4. (a) Regular assignments shall have a fixed starting time and the regular starting time shall not be changed without at least thirty-six (36) hours' notice to the employees affected.

(b) Exceptions to this Rule may be made by mutual agreement between the Management and the General Chairman or their representatives.

Absorbing Overtime

Rule 5. Employees will not be required to suspend work during regular hours to absorb overtime.

[fol. 444]

Authorizing Overtime

Rule 6. No overtime hours will be worked unless by direction of proper authority, except in cases of emergency where advance authority is not obtainable.

Notified or Called

Rule 7. (a) Except as provided in paragraph (b) of this rule, employ-s notified or called to perform work, not con-

tinuous with, before or after the regular work period, or on Sundays and specified holidays, shall be allowed a minimum of three (3) hours for two (2) hours' work or less, and if held on duty in excess of two (2) hours, time and one-half will be allowed on the minute basis.

(b) Employees who have completed their work period for the day and been released from duty, required to return for further service may, if conditions justify, be paid as if on continuous duty.

Sunday and Holiday Work

Rule 8. (a). Work performed on Sundays and the following legal holidays, namely,—New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas, (provided when any of the above holidays fall on Sunday, the day observed by the State, Nation or by proclamation shall be considered the holiday), shall be paid at the rate of time and one-half, except that employees necessary to the continuous operation [fol. 443] of the carrier who are regularly assigned to such service, will be assigned one regular day off duty in seven (7), Sunday if possible, and if required to work on such regularly assigned seventh (7th) day off duty, will be paid at the rate of time and one-half; when such assigned day of duty is not Sunday, work on Sunday will be paid for at the straight time rate.

(b) Where an employee's assigned rest day is other than Sunday and falls on one of the specified holidays, with the result that the employee is required to work more days during the year for his annual salary than he would be required to work had his rest day been Sunday, his annual vacation will be increased accordingly.

Extra employees working Sundays on positions necessary to the continuous operation of the carrier will be paid pro rata for such eight hour assignment.

Three Shift Positions

Rule 9. Where three consecutive shifts are worked covering a twenty-four (24) hour period no shift will have a starting time after twelve (12) o'clock midnight and before five (5) a. m.

Length of Meal Period

Rule 10. Except by mutual agreement the meal period shall be not less than thirty (30) minutes, nor more than one (1) hour.

Meal Period

Rule 11. When a meal period is allowed, it will be regularly assigned between the ending of the fourth (4th) hour [fol. 446] and beginning of the seventh (7th) hour after starting work, unless otherwise agreed upon.

Work During Meal Period

Rule 12. If the meal period is not afforded within the allowed or agreed time limit and is worked, the meal period shall be paid for at the pro rata rate and twenty (20) minutes with pay in which to eat shall be afforded at the first opportunity.

Continuous Work Without Meal Period

Rule 13. For the regular operations requiring continuous hours, eight (8) consecutive hours without meal period may be assigned as constituting a day's work, in which case twenty (20) minutes shall be allowed in which to eat without deduction in pay, when the nature of the work permits.

Guarantee and Basis of Pay

Rule 14. (a). Nothing within this agreement shall be construed to permit the reduction of days for regular assigned employees covered by this agreement below six (6) days per week, except that this number may be reduced, in a week in which any of the specified holidays, occur, by such holiday.

(b) Employees covered by Groups (1) and (2) Rule 1, heretofore paid on a monthly, weekly or hourly basis shall continue to be paid on the same basis.

[fol. 447] To determine the daily rate for monthly rated employees, multiply the monthly rate by twelve (12) and divided by three hundred and six (306).

To determine the pro-rata hourly rate, divide the daily rate by eight (8).

Rates

Rule 15. Established positions shall not be discontinued and new ones created under the same or different titles covering relatively the same class of work, which will have the effect of reducing the rate of pay or evading the application of these Rules.

Rating Positions

Rule 16. Positions (not employees) shall be rated and the transfer of rates from one position to another shall not be permitted.

New Positions

Rule 17. The wages for new positions shall be in conformity with the wages for positions of similar kinds or class in the seniority district where created.

Preservation of Rates

Rule 18. Employees temporarily and permanently assigned to higher rated positions shall receive the higher rates while occupying such positions; employees temporarily assigned to lower rated positions shall not have their rates reduced.

A 'temporary assignment' contemplates the fulfillment of the duties and responsibilities of the position during [fol. 448] the time occupied, whether the regular occupant of the position is absent or whether the temporary assignee does the work irrespective of the presence of the regular employee. Assisting a higher rated employee because of a temporary increase in the volume of work does not constitute a temporary assignment.

Women

Rule 19. The pay of women employees for the same class of work, shall be the same as that of men.

Vacations and Sick Leave

Rule 20. The past practice in respect to granting vacations and sick leave with pay will be continued in effect.

Part Day Release

Rule 21. When work will permit the existing practice of Saturday-afternoon release without deduction in pay will be continued.

Notified when Disallowed

Rule 22. When time claimed is disallowed, the employee upon request will be given reason for disallowance.

Article III—Seniority

Seniority

Rule 23. (a) Seniority begins at time the employee's pay starts in the Group (as established in Rule 1) on the seniority district.

(b) Where two or more employees enter upon their duties [fol. 449] at the same hour on the same day, the officer responsible for compiling the roster shall at that time designate their respective roster standing.

Re-entering Service

Rule 24. Employees voluntarily leaving the service will forfeit all seniority, and if they re-enter will be considered as new employees.

Seniority Districts

Rule 25. Seniority rosters in effect prior to the date of this agreement will be continued, except as they may be changed by mutual agreement between the Management and the Committee. Employees shown on such rosters will hold prior rights to positions covered by same. Effective this date Division or Departmental seniority districts will be established by mutual agreement between the Management and the Committee, to include employees in an agreed-upon territory. Employees on Division or Departmental rosters will then be entitled to exercise such seniority rights after first provision of this Rule has been applied.

Seniority Rosters

Rule 26. (a) A roster of all employees in each seniority district, by groups, showing name, occupation, location and proper seniority date, will be posted in places accessible

to all employees affected. The roster will be revised and posted during January of each year, and will be open to [fol. 450] protest for a period of sixty (60) days from date of posting. On proof of error correction will be made.

(b) No protests will be accepted after posting of 1940 roster except for employees acquiring seniority since posting of previous annual roster and for typographical errors.

Seniority Retention

Rule 27. Employees transferred or promoted from one Group to another (as established in Rule 1), will rank in such Group from date of transfer, but will retain and continue to accumulate seniority in the Group from which transferred. Employees so transferred or promoted will only be permitted to return to the Group from which transferred when necessary for them to exercise displacement rights.

Transferring and Consolidations

Rule 28. (a) When new departments are organized to take over work now being performed in other offices or when other combinations or divisions of offices or departments are made the re-arranged positions will be bulletined and filled insofar as possible, from the employees affected, based on seniority rights. Employees awarded such positions and employees whose positions are transferred, either within or to another seniority district, will, if they follow such positions, carry their seniority with them, but will continue to retain and accumulate seniority on their home roster.

[fol. 451] Employees not electing to follow their positions may exercise seniority rights as provided in Rule 39.

Employees transferring without their positions from one seniority district to another will rank in new seniority district from date of transfer, but will retain and continue to accumulate seniority on home rosters.

Employees covered by this rule may exercise their seniority rights in either district, when entitled to do so, but when they leave the district to which transferred for any reason, they will forfeit seniority in that district.

Promotion Basis

Rule 29. Employees covered by these Rules shall be in line for promotion, based on seniority, fitness and ability. Seniority shall govern where fitness and ability are sufficient.

Declining Promotions

Rule 30. Employees declining promotions or declining to bid for a bulletined position, shall not lose their seniority, except as provided in Rule 39.

Bulletin

Rule 31. (a) Except as otherwise agreed upon, all new positions and permanent or temporary vacancies of thirty (30) days or more duration will be promptly bulletined in agreed upon places accessible to all employees affected for a period of five (5) days in the districts where they occur; bulletin to show title, description of position, location, rate [fol. 452] of pay, and assigned hours of service and assigned day of rest, when other than Sunday. Employees desiring such positions will within five (5) days from date of posting of bulletin, file their applications in duplicate (one with designated official and one with Division Chairman). The name of the successful applicant shall immediately be posted for a period of five (5) days where the position was bulletined. All positions vacated through illness shall be bulletined under this Rule as temporary vacancies.

(b) Positions bulletined under paragraph (a) and not filled from employees on the affected district seniority roster, will then be bulletined to all employees covered by the Division or Departmental Roster affected.

Change in Rates

Rule 32. Basic rates of established positions shall not be reduced, except by agreement. Should the basic rate of an established position be increased the increased rate will be the new basic rate of the position, unless agreed otherwise.

Short Vacancies

Rule 33. New positions or vacancies of less than thirty (30) calendar days duration shall be considered short vacancies and may be filled without bulletining. However,

when it is known that such vacancies will extend beyond the thirty (30) day limit, they shall be immediately bulletined. [fol. 453] New employees or employees from other seniority rosters or districts filling new positions or vacancies which have not been bulletined, will not be considered as establishing seniority under Rule 23 by such employment.

More than One Vacancy

Rule 34. When more than one (1) vacancy or new position exists at the same time, employees shall have the right to bid on any or all, stating preference. Nothing in this Rule shall be construed to prevent employees bidding on all bulletined positions, irrespective of whether the position sought is of the same, greater or lesser remuneration.

Filing Applications

Rule 35. Employees filing applications for positions bulletined on other seniority districts will be given preference over non-employees and, or employees not covered by these Rules, on the basis of their seniority rights, if possessing sufficient fitness and ability.

Temporary Assignments

Rule 36. Bulletined positions may be filled temporarily pending an assignment, and in event no applications are received, may be filled without regard to these rules.

Former Positions Vacant

Rule 37. When an employee bids for and is awarded a bulletined position, his former position if continued in effect, will be declared vacant and bulletined.

[fol. 454]

Failure to Qualify

Rule 38. (a) Employees will be given full cooperation of Department Heads and others in their efforts to qualify.

(b) Employees awarded bulletined positions will be allowed thirty (30) days in which to qualify, and, failing, shall retain their seniority rights, may bid on any bulletined position, but may not displace any regularly assigned employee.

Reducing Force

Rule 39. When reducing forces seniority rights shall govern. At least twenty-four (24) hours' advance notice will be given employes affected, in reduction of force or abolishing positions. Employes displaced, or whose positions are abolished may exercise their seniority rights within five (5) days thereafter. Senior employes laid off, if available and qualified, shall be given preference to perform any extra work required and, when force is increased, will be returned to service in the order of their seniority rights.

Employes desiring to avail themselves of this rule, must file their names and addresses with the proper official at the time of reduction, advise promptly of any change in address and renew address each December. Employes failing to file or renew their addresses as provided herein, or return to the service within seven (7) days after being notified (by mail or telegram sent to the last address given) [fol. 455] or give satisfactory reason for not doing so, will be considered out of service and names removed from the roster.

Employes entitled to displacement rights under this Rule may be granted leave of absence, if they so request, as provided in Rule 43, without first exercising such rights provided request for a leave is made within five (5) days from the date displaced, position is abolished or transferred. During or within five (5) days after the expiration of the leave, they may exercise their seniority rights under this Rule.

Exercising Seniority

Rule 40. The exercise of seniority on reduction of force or in displacing junior employes provided for in this article is subject to the requirements of Rules 29 and 30.

Changing Duties

Rule 41. When conditions develop so that an employe cannot satisfactorily perform the assigned work, he shall, by agreement between the Management and the Division Chairman, be permitted to exercise his seniority rights over junior employes.

Rights when Starting Time is Changed

Rule 42. (a) When the established starting time of a regular position is changed more than one hour for six (6)

consecutive days or more, or changed in the aggregate two (2) hours or more during a period of one year, or changed [fol. 456] from a six (6) to a seven (7) day assignment or vice versa for a period of four (4) consecutive weeks or more, the employees affected may, within five (5) days thereafter, upon 24 hours' advance notice, exercise their seniority rights to any position held by a junior employee.

(b) When the established starting time of a regular assigned relief position is changed more than one (1) hour, or when the designated rest-day is changed, the employees affected may exercise seniority rights as outlined in the preceding paragraph.

Leave of Absence

Rule 43. (a) Except for physical disability, leave of absence in excess of ninety (90) days in any one calendar year, shall not be granted, unless by agreement between the Management and the General Committee of the employees.

(b) An employee who fails to report for duty at the expiration of leave of absence shall be considered out of service, except that when failure to report on time is the result of unavoidable delay the leave will be extended to include such delay.

(c) Duly accredited representatives of employees shall be given the necessary leave of absence to properly represent the interests of the employees covered by this agreement. They shall be considered in the service of the carrier and shall retain their seniority rank and rights if asserted [fol. 457] within thirty (30) days after release from such excepted employment.

Bidding after Absence

Rule 44. (a) An employee returning from leave of absence as provided in Rule 43, or when relieved from temporary assignment, official or excepted position, may return to former position providing it has not been abolished, or a senior employee has not exercised displacement rights thereon, or may upon return or within five (5) days thereafter exercise seniority rights on any position bulletined during such absence. In the event employee's former position has been abolished or a senior employee has exercised

displacement rights thereon, the return of the employe will be governed by the provisions of Rule 39 and he will have the privilege of exercising seniority rights over junior employes if such rights are asserted within five (5) days after his return. Employes displaced by his return may exercise their seniority rights in like manner.

(b) Employes filling temporary vacancies that have been bulletined as such, if displaced for any reason, may exercise their seniority rights in the same manner.

Official or Excepted Positions

Rule 45. (a) Employes holding official, or excepted positions, and those promoted to such positions, shall retain and continue to accumulate seniority in the district from which promoted.

[fol. 458] (b) While holding such positions they will be considered as on leave of absence, and upon their return may exercise displacement rights under Rule 44.

Extra Boards

Rule 46. When it is mutually agreed, an extra board will be maintained and rules governing the manner of working extra board employes will be established.

Article IV—Discipline and Grievances

Investigations and Hearings

Rule 47. (a) Any differences between the Company and the employes affected by this Agreement, if handled by a Committee, shall be handled by the regular certified Committee.

(b) No employe shall be disciplined without a fair hearing by a designated officer of the Railroad Company. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this Rule. At a reasonable time, prior to the hearing, the employe shall be apprised of the precise charge against him, and shall have reasonable opportunity to secure the presence of necessary witnesses and shall have the right to be represented at the hearing by representatives of his choosing.

Right of Appeal

(c) The right of appeal to the highest officer designated, as well as the right of the employe to be assisted by representatives of his choosing is conceded.

Grievances

(d) An employe who considers himself otherwise unjustly treated shall have the same right of hearing and appeal as is provided in Paragraphs (b) and (c) of this Rule.

Exoneration

(e) If the final decision decrees that the charges against the employes are not sustained the record shall be cleared of the charges and if suspended, or dismissed, the employe shall be reinstated and if found blameless, compensated for wage loss.

Advice of Cause

(f) An employe, on request, shall be given a letter stating the cause of discipline. A copy of all statements made a matter of record at the investigation or on appeal shall be furnished on request to the employe or his representative.

Date of Suspension

(g) If an employe is suspended, the suspension shall date from the time he was taken out of the service.

Pending Decision

(h) Prior to the assertion of grievances as herein provided, and while questions of grievances are pending, there [fol. 460] shall neither be a shut down by the employer nor a suspension of work by the employes.

Witnesses

Rule 48. Employes taken away from their regular assigned duties at the request of the Management, to attend court or to appear as witnesses for the carrier will be furnished transportation and will be allowed compensation equal to what would have been earned had such interruption not taken place and, in addition, necessary actual expenses while away from headquarters. Any fee or mileage accruing will be assigned to the carrier.

Incapacitated Employees.

Rule 49. Efforts will be made to furnish employment (suited to their capacity) to employees who have become physically unable to continue in service in their present positions.

Machines, Equipment and Supplies Furnished

Rule 50. Typewriters and other office equipment devices will be furnished by the Railroad Company at offices where the Management requires their use.

Bond Premiums

Rule 51. Employees shall not be required to pay premiums on bonds required by the Railroad in handling its business.

Service Letters

Rule 52. Employees whose applications are approved and [fol. 461] who have been in the service sixty (60) days or longer will upon request, if they leave the service of the carrier, be furnished with a service letter showing length of service, capacity in which employed and cause for leaving.

Duly Accredited Representatives

Rule 53. Where the term "duly accredited representatives" appears in this Agreement it shall be understood to mean the regular constituted Committee of the Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employers, and/or the officers of the organization of which that Committee is a part.

Mutual Agreements

Rule 54. If exceptions to any Rule or Rules in this Agreement be made they shall be subject to approval by the Management and the General Committee.

Basic Rates of Pay

Rule 55. Except as otherwise agreed, basic rates of pay now in effect shall be considered as negotiated rates and become a part of this agreement.

Date Effective and Changes

Rule 56. This agreement shall be effective as of January 1, 1939 and shall continue in effect until it is changed as provided herein or under the provisions of the amended Railway Labor Act.

Should either party to this agreement desire to revise [fol. 462] or modify these rules, thirty (30) days' written advance notice of such action containing the proposed changes, shall be given to the other party and conference shall be held immediately on the expiration of said notice unless another date is mutually agreed upon.

For the Lackawanna Railroad

E. B. Moffatt, General Superintendent.

For the Employees: Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees

Louis A. Carlo, General Chairman; Arthur D. Cornell, Vice Chairman; Joseph Scanlon, Vice Chairman; Sidney Denny, General Secretary-Treasurer; L. B. Snedden, Vice Grand President.

Dated: January 31st, 1939.

[fol. 463]

PLAINTIFF'S EXHIBIT 10

DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY

RULES AND RATES OF PAY FOR TELEGRAPHERS

Effective May 1, 1940

RULES

Rule 1—Scope

Effective May 1, 1940, the following rules and working conditions will apply to telegraphers, telephone operators (except switchboard operators); Agents, as shown in the rate schedule; Assistant Agents; Agent-telegraphers and Agent-telephoners; towermen, levermen, tower and train directors, wire-chiefs, Managers of telegraph offices and operators of mechanical telegraph machines installed for

the purpose of replacing telegraph communication, herein after referred to as employees.

Rule 2—Basic Day

Except as specified in Rule 3, eight (8) consecutive hours, exclusive of the meal hour, shall constitute a day's work, except that where two or more shifts are worked, eight (8) consecutive hours with no allowance for meals shall constitute a day's work,

[fol. 464] *Rule 3—Intermittent Service*

At small non-telegraph or non-telephone agencies, where service is intermittent, eight (8) hours' actual time on duty within a spread of twelve (12) hours shall constitute a day's work. Employees filling such positions shall be paid overtime for all time actually on duty or held for duty in excess of eight (8) hours from the time required to report for duty to the time of release within twelve (12) consecutive hours and also for all time in excess of twelve (12) consecutive hours, computed continuously from the time first required to report until final release. Time shall be counted as continuous service in all cases where the interval of release from duty does not exceed one (1) hour.

Exceptions to the foregoing paragraph shall be made for individual positions when agreed to between the Management and duly accredited representatives of the employees. For such excepted positions the foregoing paragraph shall not apply.

This rule shall not be construed as authorizing the working of split tricks where continuous service is required.

Intermittent service is understood to mean service of a character where, during the hours of assignment, there is no work to be performed for periods of more than one (1) hour's duration and service of the employees cannot otherwise be utilized.

[fol. 465] Employees covered by this rule will be paid not less than eight (8) hours within a spread of twelve (12) consecutive hours.

Rule 4—Overtime

Except as otherwise provided, time worked in excess of eight (8) hours, exclusive of meal period, on any day, will be considered overtime and paid on the actual minute basis at time and one-half rate.

Rule 5—Call Rule

Employees notified or called to perform work not continuous with the regular work period will be allowed a minimum of three (3) hours for two (2) hours' work or less, and if held on duty in excess of two (2) hours, time and one-half will be allowed on the minute basis.

Rule 6—Meal Period

(a) Where but one shift is worked employees will be allowed sixty (60) consecutive minutes for meals between four (4) hours and thirty (30) minutes and six (6) hours and thirty (30) minutes after starting work.

(b) If the meal period is not afforded within the allowed or agreed time limit and is worked, the meal period shall be paid for at the pro rata rate and thirty (30) minutes, with pay, in which to eat shall be afforded at the first opportunity.

Rule 7.—Starting Time

(a) Regular assignments shall have a fixed starting [fol. 466] time and the regular starting time shall not be changed without at least eighteen (18) hours advance notice to the employees affected.

(b) Where three consecutive shifts are worked covering the twenty-four (24) hour period, no shift shall have a starting time after twelve o'clock (12M) midnight and before six (6) A.M.

Rule 8—Sunday and Holiday Work

(a) Employees will be excused from Sunday and holiday duties as much as the condition of business will permit.

(b) Time worked on Sundays and the following holidays—namely, New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas (provided when any of the above holidays fall on Sunday, the day observed by the State, Nation, or by proclamation shall be considered the holiday), shall be paid for at the regular hourly rate when the entire number of hours constituting the regular week-day assignment are worked.

(c) When notified or called to work on Sundays and the above specified holidays a less number of hours than constitute a day's work within the limits of the regular weekday assignment, employees shall be paid a minimum allowance of two (2) hours at overtime rate for two (2) hours work or less, and at the regular hourly rate after the second hour of each tour of duty. Time worked before [fol. 467] or after the limits of the regular weekday assignment shall be paid for in accordance with overtime and call rules.

Rule 9—Basis of Pay

Employees will be paid on the basis of rates shown in Rate Schedule appended to this agreement.

Rule 10—Discipline and Grievances

(a) No employee shall be disciplined without a fair hearing by a designated officer of the Company. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, he is entitled to be apprised of the precise charge against him. He shall have reasonable opportunity to secure the presence of necessary witnesses and shall have the right to be there represented by representatives of his choosing. If the judgment shall be in his favor, he shall be compensated for the wage loss, if any, suffered by him.

(b) The Management accords to employees the right to appeal to its highest officers.

(c) An employee who considers himself otherwise unjustly treated shall have the same right of hearing and appeal as provided in Paragraphs (a) and (b) of this rule.

Rule 11—Suspension of Work During Regular Hours

Employees will not be required to suspend work during regular hours or to absorb overtime.

[fol. 468] *Rule 12—Classification of Employees, New Positions, etc.*

(a) Where existing payroll classification does not conform to Rule 1, employees performing service in the classes specified therein shall be classified in accordance therewith.

(b) When the duties of a position are materially changed, compensation will be changed to conform with similar position.

(c) When new positions are created compensation shall be established in conformity with similar positions on the same sub-district or sub-division under a superintendent's jurisdiction, or in the event there is no similar position on that sub-district or sub-division, then upon similar positions on contiguous districts.

Rule 13—Court Duty and Investigations

(a) Employees temporarily engaged in business of the Company outside the line of their regular duties, at court or otherwise, will be paid their regular wages and necessary expenses while so engaged, court fees and mileage to be assigned to the Company.

(b) Employees required to attend investigations, will be paid for all time lost if not at fault.

Rule 14—Express Commissions

(a) When express commissions are discontinued or created at any office, thereby reducing or increasing the average monthly compensation paid to any position, prompt [fol. 469] adjustment of the salary affected will be made conforming to rates paid for similar positions.

Rule 15—Extra Work for Regular Men, and Relief Men

(a) Employees holding temporary or regular assignments will not be required to do relief work except in case of emergency. When they are required to do relief work at any office other than the one to which assigned, they will be paid the rates of the position they fill, but not less than their regular rates and shall be paid straight time on the minute basis at the rate of the higher paid position while traveling to and from the temporary assignment, in no case to exceed eight (8) hours pay. In addition to this they shall be reimbursed for any time lost in making the change, also receive one dollar (\$1.00) per day for expenses.

(b) Regular relief employees will be allowed \$2.00 per calendar day for expenses while away from their head-

quarters, when, due to train service, such men cannot live at home, provided no undue hardships are imposed. This does not apply to extra men.

(c) Telegraphers and telephoners required to relieve employes at non-telegraph stations will be paid not less than the minimum rate for telegraphers.

Rule 16—Seniority and Promotions

(a) Applicants for positions requiring posting will do [fol. 470] so on their own time. When station accounts are transferred each employe will be paid the regular rate for that station for the time required to make the transfer with the minimum of one (1) day. Employes who are ordered into positions by the Management will be allowed time for posting if necessary.

(b) Employes will be in line for promotion and where ability and qualifications are sufficient, in the judgment of the Management, seniority will prevail.

(c) New positions or vacancies will be promptly bulletined for a period of ten days and assigned promptly according to the above rules. Name of the successful bidder will be posted.

Employes awarded bulletined positions and failing to qualify may be displaced but shall retain their seniority rights and may bid on any bulletined position, but may not displace any regularly assigned employe.

If the position to which an employe is assigned is discontinued before he worked the position, the assignment shall be considered null and void. An employe has made his selection when he has notified the proper official of his choice.

(d) Employes promoted to official or supervisory positions may retain their seniority rights; if demoted they will go on the extra list until a vacancy occurs to which their seniority and merit give them right.

[fol. 471] (e) Employes dismissed from the service of the railroad and re-employed within one year, shall not lose their seniority. Those who leave the service voluntarily and are re-employed, will rank as new men.

(f) Seniority begins at the time the employe starts to work in the class in which he is regularly employed.

(g) Seniority rosters of employes on each Division will be revised in January of each year, and a copy sent to each office and to the General and Local Chairman.

(h) Employes transferred from one Superintendent's Division to another, by their own request, shall rank from date of transfer on seniority list of division to which transferred.

(i) When the railroad transfers an extra employe from one division to another, temporarily, such employe shall retain his seniority on the division from which transferred and rank on the division to which transferred from the date of transfer. If he remains on the new division three months, he shall surrender seniority on division from which transferred.

(j) When an office is transferred from one Superintendent's division to another, such employes shall carry their seniority to the division to which transferred.

(k) Employes leaving the service after having been employed six months or more, will upon request, be given a certificate stating term of service and reason for leaving.

[fol. 472] (m) An employe coming within the scope of this agreement, if displaced from regular position, must place himself within ten (10) days of date of such displacement, otherwise he will revert to the extra list and be permitted to exercise seniority only in connection with any position that may be vacant. An employe is displaced when he is actually relieved by employe displacing him.

When an employe has been displaced by a senior man, he shall be notified promptly.

Rule 17—Temporary Vacancies

(a) When a position is vacant five (5) days it will be given to the senior qualified applicant. Applicant must make his intention known at least twenty-four (24) hours before starting time.

Incumbents of temporary vacancies may be displaced by a senior incumbent of a temporary vacancy that has terminated, otherwise a senior employe may exercise displacement rights only after each five (5) day period of the temporary vacancy.

(b) Temporary and known vacancies of more than 30 days duration will be regularly advertised.

(c) Employees holding regular assigned positions when filling a temporary vacancy shall return to their regular position:

1st. At the expiration of such temporary vacancy.

[fol. 473] 2nd. If displaced from such vacancy, unless they elect another displacement as provided in paragraph (a) of this article.

3rd. Upon five (5) days' notice to the proper railroad official.

Rule 18—Extra Employees

A temporary vacancy of three (3) days or less duration will be filled by the senior qualified employee not then employed, if available.

Rule 19—Typewriters

Typewriters will be furnished at offices where the railroad requires their use.

Rule 20—Distributing Schedules

The schedule of wages and working conditions shall be printed by the Railroad and each employee affected thereby shall be provided with a copy.

Rule 21—Reduction of Forces

In the event of a reduction in forces in positions covered by this schedule, the incumbents of the positions abolished will have the right to any position covered by this schedule on the division where they are employed, which they are competent to fill, and the incumbents thereof are their juniors in the service and will be given employment on other divisions, if qualified, in preference to persons not in the service.

Rule 22—Trading Positions

(a) Employees may be permitted to change positions temporarily, not to exceed ninety (90) days in any one calendar year, but in all cases the approval of the superintendent and the local chairman will be required.

It is understood that such changes will in no case result in causing additional expense to the company.

(b) Employees who hold a regular position and bid in a seasonal position, shall return to their former position when such seasonal position is abolished.

Rule 23—Guarantees

Regularly assigned employees will receive one day's pay within each twenty-four (24) hours period according to location occupied or to which entitled, if ready for service and not used, or if required on duty less than the required minimum number of hours as per location, except on Sundays and holidays.

Rule 24—Bidding on Positions

Applications for bulletined positions must be filed within ten (10) days of date of bulletin, in duplicate, one copy to be mailed to proper officer of the railroad and one copy to the local chairman.

Rule 25—Leave of Absence

(a) Employees who have been in the service of the Company for two years or more, may, on request, be given leave of absence, if relief men are available. Except for physical disability, leave of absence in excess of 90 days in any calendar year shall not be granted, unless by agreement [fol. 475] between the Management and duly accredited representatives of the employees.

(b) An employee who fails to report for duty at the expiration of leave of absence, shall be considered out of the service, except that when failure to report on time is the result of unavoidable delay, the leave will be extended to include such delay.

Rule 26—Change of Location

When an office is moved from one location to another and beyond the location of another office of like character, the individuals employed at the original location shall have the right to elect within five (5) days from the date of change whether they will follow the office. If they decide not to follow the office, Rule 21 applies.

Rule 27—Deadheading

(a) Deadheading in the exercise of seniority will not be paid for.

(b) Extra employes covered by this schedule deadheading under orders will be paid at the rate of 55¢ an hour for actual time in excess of one hour consumed in traveling to or from position of employe relieved. Where such position is held by an extra employe for more than one day the initial and final deadheads only will be paid for.

(c) This rule will apply to deadheading from a point east of Dover to a point west thereof or vice versa, but shall not apply to deadheading from one point to another point. [fol. 476] Dover and east; nor will it include time spent in waiting between trains, following arrival of trains, or awaiting schedule departure of trains.

(d) Chief Dispatchers will designate home station of extra employes.

Rule 28—Resuming Former Position

After bidding upon and being assigned to an advertised vacancy, an employe may then bid on the vacancy created by his re-assignment but in so doing forfeits right to rebid on the position first advertised until after it is filled by assignment and again becomes vacant.

Rule 29—Duration of Agreement

Rules and Rates of Pay as contained herein shall be continued in effect subject to thirty (30) days' notice by either party.

For the Railroad: E. B. Moffatt, General Superintendent.

For the Telegraphers: O. L. Chadwick, General Chairman.

[fol. 477]

PLAINTIFF'S EXHIBIT 10

Rates of Pay—M. & E. Division

Location—Position	Rate Per	
	Month	Hour
140 Cedar Street, New York:		
Operator	\$	86
Produce Exchange, New York:		
Operator		76
Barclay Street, New York:		
Ticket Agent	\$235	20
23rd Street, New York:		
Ticket Agent	235	20
Hoboken:		
Asst. Ticket Agent	210	20
Third Ticket Agent	199	20
Dispatcher's Office—		
Operator, First Trick		83
Operator, Third Trick		79
Information Bureau—		
Operator, First Trick		85
Operator, Second Trick		81
Yard Office—		
Operator		80
Terminal Tower—		
Tower Director, First Trick		1 00
Tower Director, Second Trick		1 00
Tower Director, Third Trick		1 00
Leverman, First Trick (2)		92
Leverman, Second Trick (3)		92
Leverman, Third Trick (1)		92
Engine House—		
Leverman, First Trick		75
Leverman, Second Trick		75
Leverman, Third Trick		75
Grove Street Tower—		
Leverman, First Trick		87 $\frac{1}{2}$
Leverman, Second Trick		87 $\frac{1}{2}$
Leverman, Third Trick		87 $\frac{1}{2}$
Operator, First Trick		78
Operator, Second Trick		78
Henderson Street—		
Towerman, First Trick		70
Towerman, Second Trick		70
Towerman, Third Trick		70

[fol. 478]

West End—		
Towerman, First Trick		87
Towerman, Second Trick		87
Towerman, Third Trick		87
Operator, First Trick		78
Operator, Second Trick		78
Newark:		
Ticket Agent	215	20
Towerman, First Trick		74 $\frac{1}{2}$
Towerman, Second Trick		74 $\frac{1}{2}$
Towerman, Third Trick		74 $\frac{1}{2}$
Roseville Avenue:		
Ticket Agent	177	20
Towerman, First Trick		73 $\frac{1}{2}$
Towerman, Second Trick		73 $\frac{1}{2}$
Towerman, Third Trick		73 $\frac{1}{2}$

PLAINTIFF'S EXHIBIT 10—Continued

Location—Position	Rate Per	
	Month	Hour
Harrison:		
Towerman, First Trick		70
Towerman, Second Trick		70
Towerman, Third Trick		70
Kearney Junction:		
Towerman, First Trick		70
Towerman, Second Trick		70
Towerman, Third Trick		70
Ampere:		
Ticket Agent		74
Watessing Avenue:		
Ticket Agent		69
Bloomfield:		
Ticket Agent		75
Glen Ridge:		
Ticket Agent		71
Montclair:		
Ticket Agent	191	20
Towerman, First Trick		72
Towerman, Second Trick		72
Towerman, Third Trick		72
Grove Street:		
Ticket Agent		73½
East Orange:		
Ticket Agent	176	20
[fol. 479]		
Brick Church:		
Ticket Agent	186	20
Orange:		
Ticket Agent	201	20
Towerman, First Trick		72½
Towerman, Second Trick		72½
Towerman, Third Trick		72½
Highland Avenue:		
Ticket Agent		69½
Mountain Station:		
Ticket Agent		70
South Orange:		
Ticket Agent	191	20
Freight Agent	165	20
Towerman, First Trick		76
Towerman, Second Trick		76
Towerman, Third Trick		76
Maplewood:		
Ticket Agent		72
Millburn:		
Ticket Agent		66
Asst. Agent	4.71¼	(day)
Towerman, First Trick		72½
Towerman, Second Trick		72½
Towerman, Third Trick		72½
Short Hills:		
Ticket Agent		68½
Summit:		
Ticket Agent		84½
Freight Agent	165	20
Towerman, First Trick		73½
Towerman, Second Trick		73½
Towerman, Third Trick		73½
New Providence:		
Agent		60

PLAINTIFF'S EXHIBIT 10--Continued

Location--Position	Rate Per	
	Month	Hour
Murray Hill:		
Agent-Operator		68
Berkeley Heights:		
Agent		65
Stirling:		
Agent-Operator		67 1/2
[fol. 480]		
Millington:		
Agent-Operator		71 1/2
Lyons:		
Agent		60
Basking Ridge:		
Agent-Operator		67
Bernardsville:		
Agent-Operator	165.20	
Clerk-Operator		71
Far Hills:		
Agent-Operator		65 1/2
Peapack:		
Agent		65
Gladstone:		
Agent-Operator		67
Chatham:		
Ticket Agent		68
Madison:		
Ticket Agent	181.20	
Freight Agent	160.20	
Convent:		
Agent-Operator		68
Morristown:		
Ticket Agent	191.20	
Freight Agent	210.20	
Clerk-Operator		70
Towerman, First Trick		70
Towerman, Second Trick		70
Towerman, Third Trick		70
Morris Plains:		
Agent-Operator		71 1/2
Secaucus:		
Agent	193.15	
Towerman, E. End, 1st Trick		74
Towerman, E. End, 2nd Trick		74
Towerman, E. End, 3rd Trick		74
Towerman, W. End, 1st Trick		78
Towerman, W. End, 2nd Trick		78
Towerman, W. End, 3rd Trick		78
Kingland:		
Agent	171.20	
[fol. 481]		
Lyndhurst:		
Agent-Operator		67 1/2
Delawanna:		
Agent		70 1/2
Passaic:		
Agent-Operator		73 1/2
Clifton:		
Assistant Agent	4.71 (day)	
Paterson:		
Ticket Agent	202.15	

PLAINTIFF'S EXHIBIT 10—Continued

Location—Position	Rate Per	
	Month	Hour
Paterson Jct.:		
Towerman, First Trick		72
Towerman, Second Trick		72
Towerman, Third Trick		72
Little Falls:		
Agent		68½
Mountain View:		
Agent		67½
Towerman, First Trick		75
Towerman, Second Trick		75
Towerman, Third Trick		75
Lincoln Park:		
Agent		68
Towaco:		
Agent		64
Boonton:		
Ticket Agent		75½
Freight Agent	185.20	
Clerk-Operator		64
Mountain Lakes:		
Agent		64½
Andover:		
Agent-Operator		66
Branchville:		
Agent-Operator		68½
Newton:		
Agent	170.20	
Clerk-Operator		60
Johnsonburg:		
Agent-Operator		68½
[fol. 482]		
Blairstown:		
Agent-Operator		70
Denville:		
Agent		65½
Towerman, First Trick		78
Towerman, Second Trick		78
Towerman, Third Trick		78
Rockaway:		
Agent-Operator		68½
Dover:		
Ticket Agent	186.20	
Freight Agent	200.20	
Towerman, First Trick		78½
Towerman, Second Trick		78½
Towerman, Third Trick		78½
East Dover Junction:		
Towerman, First Trick		73
Towerman, Second Trick		73
Towerman, Third Trick		73
Chester Junction:		
Towerman, First Trick		71
Towerman, Second Trick		71
Towerman, Third Trick		71
Port Morris—East End:		
Towerman, First Trick		80
Towerman, Second Trick		80
Towerman, Third Trick		80
Succasunna:		
Agent		66

PLAINTIFF'S EXHIBIT 10—Continued

Location—Position	Rate Per	
	Month	Hour
Hopatcong:		
Agent-Operator		76
Netcong:		
Agent-Operator	173	15
Clerk-Operator		70
Hackettstown:		
Agent	146	05
Washington:		
Agent	210	20
Towerman, First Trick		74
Towerman, Second Trick		74
Towerman, Third Trick		74
[fol. 483]		
New Village:		
Agent	210	20
Oxford Furnace:		
Agent-Operator	166	20
Bridgeville:		
Agent-Operator		70
Manunka Chunk:		
Towerman, First Trick		73
Towerman, Second Trick		73
Towerman, Third Trick		71½
Portland:		
Agent	196	20
Bangor:		
Agent	176	20
Pen Argyl:		
Agent	155	20
Belfast Junction:		
Agent	145	20
Nazareth:		
Agent	225	00
Clerk-Operator		67
Martins Creek:		
Agent	160	20

Scranton Division

Stateford Junction:		
Towerman, First Trick		73½
Towerman, Second Trick		73½
Towerman, Third Trick		73½
Water Gap:		
Agent-Operator		76
Stroudsburg:		
Ticket Agent		77½
Clerk-Operator		70½
Towerman, First Trick		74½
Towerman, Second Trick		74½
Towerman, Third Trick		74½
Gravel Place:		
Towerman, First Trick		73½
Towerman, Second Trick		73½
Towerman, Third Trick		73½

[fol. 484]

West Henryville:		
Towerman, First Trick		72½
Towerman, Second Trick		72½
Towerman, Third Trick		72½

Scranton Division—Continued

Location—Position	Rate Per	
	Month	Hour
Cresco:		
Agent-Operator		71
Clerk-Operator		70
Mount Pocono:		
Agent-Operator		71
Clerk-Operator		70
Pocono-Summit:		
Agent-Operator		68
Towerman, First Trick		72 $\frac{1}{2}$
Towerman, Second Trick		72 $\frac{1}{2}$
Towerman, Third Trick		72 $\frac{1}{2}$
Tobyhanna:		
Agent-Operator		73
Towerman, First Trick		73
Towerman, Second Trick		73
Towerman, Third Trick		73
Gouldsboro:		
Agent-Operator		71
Lehigh Tower:		
Towerman, First Trick		72 $\frac{1}{2}$
Towerman, Second Trick		72 $\frac{1}{2}$
Towerman, Third Trick		72 $\frac{1}{2}$
Moscow:		
Agent-Operator		70
Scranton:		
Operator 'Z' Office		84
Clerk-Oper.-Dispr.		78
Information Bureau—		
Operator		80
Nav Aug—		
Towerman, First Trick		72 $\frac{1}{2}$
Towerman, Second Trick		72 $\frac{1}{2}$
Towerman, Third Trick		72 $\frac{1}{2}$
East End—		
Towerman, First Trick		72 $\frac{1}{2}$
Towerman, Second Trick		72 $\frac{1}{2}$
Towerman, Third Trick		72 $\frac{1}{2}$
[fol. 485]		
Mattes Street—		
Towerman, First Trick		77
Towerman, Second Trick		77
Towerman, Third Trick		77
Bridge 60—		
Tower Director		85
Towerman, First Trick		85
Towerman, Second Trick		85
Towerman, Third Trick		82
Yard Office—		
Operator, First Trick		72
Operator, Second Trick		72
Operator, Third Trick		72
Cavuga Tower—		
Towerman, First Trick		72 $\frac{1}{2}$
Towerman, Second Trick		72 $\frac{1}{2}$
Towerman, Third Trick		72 $\frac{1}{2}$
Clarks Summit:		
Agent-Operator	156.20	
Towerman, First Trick		74 $\frac{1}{2}$
Towerman, Second Trick		74 $\frac{1}{2}$
Towerman, Third Trick		74 $\frac{1}{2}$

Scranton Division--Continued

Location--Position		Rate Per Month Hour	
Dalton:			
	Agent-Operator		72
Factoryville:			
	Agent-Operator		70
	Towerman, First Trick		72 $\frac{1}{2}$
	Towerman, Second Trick		72 $\frac{1}{2}$
	Towerman, Third Trick		72 $\frac{1}{2}$
Nicholson:			
	Agent-Operator		72
Foster:			
	Agent-Operator		72
Kingsley:			
	Agent-Operator		70
Montrose:			
	Agent-Operator		80 $\frac{1}{2}$
New Milford:			
	Agent-Operator		71 $\frac{1}{2}$
	Operator, First Trick		72 $\frac{1}{2}$
	Operator, Second Trick		72 $\frac{1}{2}$
	Operator, Third Trick		72 $\frac{1}{2}$
[fol. 486]			
Hallstead:			
	Agent-Operator		73
Conklin:			
	Agent	85 20	
Vestal:			
	Agent-Operator		75
	Clerk-Operator (2)		70
Apalachin:			
	Agent-Operator		70
Owego:			
	Agent	210 20	
	Clerk-Oper., First Trick		72
	Clerk-Oper., Second Trick		72
	Clerk-Oper., Third Trick		72
Nichols:			
	Agent-Operator		71 $\frac{1}{4}$
	Clerk-Operator		70 $\frac{1}{4}$
Waverly:			
	Clerk-Operator, First Trick		71
	Clerk-Operator, Second Trick		71
	Clerk-Operator, Third Trick		71
Candor:			
	Agent-Operator		69
Ithaca:			
	Ticket Clerk-Operator		71
Taylor:			
	Agent-Operator		75
Old Forge:			
	Agent-Operator		75 $\frac{1}{4}$
Duryea:			
	Agent-Operator		72
Pittston:			
	Agent-Operator		72 $\frac{1}{4}$
West Pittston:			
	Agent-Operator		78
Wyoming:			
	Agent-Operator		73 $\frac{1}{2}$
Luzerne:			
	Agent-Operator	166 20	

Scranton Division—Continued

Location—Position		Rate Per Month	Hour
Kingston:			
	Ticket Agent	181	60
[fol. 487]			
Kingston Yard:			
	Operator		70
Plymouth Junction:			
	Towerman, First Trick		70
	Towerman, Second Trick		70
	Towerman, Third Trick		70
Plymouth:			
	Agent-Operator	205	20
	Clerk-Operator		73
West Nanticoke:			
	Agent-Operator		72½
Hunlock Creek:			
	Agent-Operator		70
Shickshinny:			
	Agent-Operator		70½
	Clerk-Operator		68½
Berwick:			
	Ticket Clerk-Operator		75
Bloomsburg:			
	Clerk-Operator		73
	Clerk-Operator		71½
Danville:			
	Agent	191	20
	Clerk-Operator		72½
Northumberland:			
	Agent-Operator		82
	Clerk-Operator		74

Buffalo Division

Elmira Passenger Station:			
	Operator-Clerk, First Trick		71
	Operator-Clerk, Second Trick		70
	Operator-Clerk, Third Trick		70
Elmira Yard:			
	Operator-Towerman, 1st Trick		74
	Operator-Towerman, 2nd Trick		74
	Operator-Towerman, 3rd Trick		74
Elmira Heights:			
	Agent-Operator		70
[fol. 488]			
Horseheads:			
	Assistant Agent	5	16 (day)
Big Flats:			
	Agent-Operator		68
Corning Passenger Station:			
	Ticket Agt.-Oper., 1st Trick		71
	Ticket Clk.-Oper., 2nd Trick		66
	Ticket Clk.-Oper., 3rd Trick		70
Painted Post:			
	Agent		69
Campbell:			
	Agent-Operator		70
Savona:			
	Agent-Operator		68

Buffalo Division—Continued

Location—Position.		Rate Per	Hour
Bath:			
	Clerk-Operator, First Trick		70 1/2
	Clerk-Operator, Second Trick		68 1/2
	Clerk-Operator, Third Trick		68 1/2
Kanona:			
	Agent-Operator		66
Avoca:			
	Agent-Operator		70 1/2
Wallace:			
	Agent-Operator		67
Cohocton:			
	Agent-Operator		72 1/2
	Clerk-Operator		67 1/2
Atlanta:			
	Agent-Operator		68 1/2
Wayland:			
	Agent-Operator	165 00	
Perkinsville:			
	Asst. Agent	4 71	(day)
Dansville:			
	Agent-Operator	173 15	
	Clerk-Operator, Second Trick		69 1/2
	Clerk-Operator, Third Trick		69 1/2
Groveland:			
	Agent		84
	Towerman-Oper., 1st Trick		71 1/2
	Towerman-Oper., 2nd Trick		71 1/2
	Towerman-Oper., 3rd Trick		71 1/2
[fol. 489]			
Mt. Morris:			
	Agent	206 20	
	Clerk-Operator, First Trick		69 1/2
	Clerk-Operator, Second Trick		69 1/2
	Clerk-Operator, Third Trick		69 1/2
Mt. Morris-PRR.			
	Towerman, First Trick		71 1/2
	Towerman, Second Trick		70 1/2
	Towerman, Third Trick		69
Greigsville:			
	Agent-Operator		76
Linwood:			
	Agent-Operator		70
B. & O. Jct.:			
	Agent-Operator	173 15	
	Operator, Second Trick		69 1/2
	Operator, Third Trick		69 1/2
East Bethany:			
	Agent-Operator		73
North Alexander:			
	Agent-Operator		69
Lancaster:			
	Agent	176 20	
Buffalo Passenger Station:			
	Operator, First Trick		80
	Operator, Second Trick		80
Buffalo:			
	Michigan Avenue—		
	Towerman, First Trick		81
	Towerman, Second Trick		81
	Towerman, Third Trick		81

Buffalo Division—Continued

Location—Position	Rate Per	
	Month	Hour
Buffalo River Draw—		
Towerman, First Trick		73
Towerman, Second Trick		73
Towerman, Third Trick		73
E. Buffalo Yard—		
Operator		76
Towerman, First Trick		74
Towerman, Second Trick		74
Towerman, Third Trick		74
[fol. 490]		
S. & U. Division		
Binghamton:		
W. F. Office—		
Operator		81 1/2
Operator		80
Yard Office—		
Operator, First Trick		73
Operator, Second Trick		72
Operator, Third Trick		72
BY Tower—		
Towerman, First Trick		80 1/2
Towerman, Second Trick		80 1/2
Towerman, Third Trick		80 1/2
Syracuse:		
Yard Office—		
Operator, First Trick		72 1/2
Operator, Second Trick		72 1/2
Operator, Third Trick		72 1/2
Magnolia St. Tower—		
Leverman, First Trick		70
Leverman, Second Trick		70
Leverman, Third Trick		70
Passenger Station—		
Ticket Agent-Operator		86 1/2
Clerk-Operator		72
Oswego Passenger:		
Ticket Clerk-Oper., 2nd Trick		67
Minetto:		
Agent-Operator	191	32
Fulton:		
Clerk-Operator		70
Lamson:		
Agent-Operator		70
Baldwinsville:		
Agent-Operator	151	20
Jamesville:		
Agent-Operator		77
Clerk-Operator, Second Trick		73
Clerk-Operator, Third Trick		72
Onativia:		
Agent-Operator		69
[fol. 491]		
Apulia:		
Agent-Operator		70 1/2
Clerk-Operator, Second Trick		68
Clerk-Operator, Third Trick		66
Tully:		
Agent-Operator		75
Little York:		
Agent-Operator		72 1/2

S. & U. Division—Continued

Location—Position		Rate Per Month Hour	
Homer:			
	Agent-Operator	156 20	
	Clerk-Operator		70½
Cortland Passenger Station:			
	Ticket Agent		70½
	Clerk-Operator, Second Trick		72½
	Clerk-Operator, Third Trick		72½
Marathon:			
	Agent-Operator		69½
	Clerk-Operator, Second Trick		69½
	Clerk-Operator, Third Trick		69½
Killawog:			
	Agent-Operator		67
Whitney Point:			
	Agent-Operator	156 20	
Chenango Forks:			
	Towerman, First Trick		72
	Towerman, Second Trick		72
	Towerman, Third Trick		72
Chenango Bridge:			
	Agent-Operator		69
McGraw:			
	Agent-Operator		65
East Freetown:			
	Clerk-Operator	5 11 (day)	
Cincinnati:			
	Agent-Operator		66
Utica Yard:			
	Clerk-Operator, First Trick		71½
	Clerk-Operator, Second Trick		71½
New Hartford:			
	Agent-Operator		77
[fol. 492]			
Chadwick:			
	Agent-Operator	156 20	
	Clerk-Operator, First Trick		70
	Clerk-Operator, Second Trick		69
Clayville:			
	Agent-Operator		76
Richfield Junction:			
	Agent-Operator		71
	Clerk-Operator		68½
Waterville:			
	Agent-Operator	151 20	
	Clerk-Operator, First Trick		70
	Clerk-Operator, Second Trick		70
North Brookfield:			
	Agent-Operator		69½
Hubbardsville:			
	Agent-Operator		68
Earlville:			
	Agent-Operator		71
Sherburne:			
	Agent-Operator	156 00	
	Clerk-Operator, First Trick		70
	Clerk-Operator, Second Trick		70
Norwich Passenger:			
	Clerk-Operator, First Trick		71
	Clerk-Operator, Second Trick		71
	Clerk-Operator, Third Trick		71

S. & U. Division—Continued

Location—Position	Rate Per	
	Month	Hour
Oxford:		
Agent-Operator70
Green:		
Agent-Operator	151.20	
Clerk-Operator70
Bridgewater:		
Agent-Operator68 1/2
West Winfield:		
Agent-Operator68 1/2
Richfield Springs:		
Agent-Operator83
Clerk-Operator70

[fol. 493]

STIPULATION AS TO EXHIBITS

(Same Title)

It Is Hereby Stipulated that the Plaintiff's Exhibits Nos. 1, 3, 6 and 10 in evidence shall be added to the printed record herein in the Court of Appeals and that the originals of said exhibits and of all exhibits not printed or included in said record may be produced and used by any of the parties upon the argument or submission of the appeal, and may be referred to by any of the parties in their respective briefs and submitted to the Court with the same force and effect as if printed and included in the record.

Dated: April —, 1949.

Sayles & Evans, Attorneys for Plaintiff-Respondent;
 John F. Dwyer, Attorney for Defendant-Appellant;
 Mandeville, Buck, Teeter & Harpending, Attorneys for Defendant.

[fol. 494] STIPULATION WAIVING CERTIFICATION

(Same Title)

It Is Hereby Stipulated, in accordance with the provisions of Sec. 170 of the Civil Practice Act, that the foregoing copies of the record and supplemental record in the Appellate Division, notice of appeal to the Court of Appeals, order granting leave to appeal to the Court of Appeals, order of affirmance by the Appellate Division, judgment of affirmance by the Appellate Division, opinion of Appellate

Division, *Per Curiam*, on affirmance, are true and correct copies of the originals thereof on file in the Office of the Clerk of the County of Chemung, and certification of the same is hereby waived.

Dated: April —, 1949.

Sayles & Evans, Attorneys for Plaintiff-Respondent;
John F. Dwyer, Attorney for Defendant-Appellant;
Mandeville, Buck, Teeter & Harpending, Attorneys for Defendant.

[fol. 494a] PROCEEDINGS IN THE COURT OF APPEALS

[fol. 495] ORDER OF AFFIRMANCE BY COURT OF APPEALS

No. 168

COURT OF APPEALS,

State of New York, ss:

Pleas in the Court of Appeals held at Court of Appeals Hall, in the City of Albany, on the 19th day of July in the year of our Lord one thousand nine hundred and forty-nine, before the Judges of said Court.

Witness: The Hon. John T. Loughran, Chief Judge, Presiding; John Ludden, Clerk.

Remittitur: July 19, 1949.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD
COMPANY, Respondent

vs.

MARION J. SLOCUM, as General Chairman of Lackawanna Division No. 30 of the Order of Railroad Telegraphers, Appellant,

and

LOUIS J. CARLO, as General Chairman, etc., Defendant

Be it Remembered, That on the 10th day of May in the year of our Lord one thousand nine hundred and forty—
[fol. 496] nine Marion J. Slocum, as General Chairman of Lackawanna Division No. 30 of the Order of Railroad Telegraphers, the Appellant—in this cause, came here unto the Court of Appeals, by John F. Dwyer, his attorney—and

filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And The Delaware, Lackawanna & Western Railroad Company, the respondent—in said cause afterwards appeared in said Court of Appeals by Sayles & Evans, its attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Manly Fleischmann, of counsel for the appellant—and by Mr. Pierre W. Evans, of counsel for the respondent—and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, with costs, as aforesaid.

[fol. 497] And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, etc.

John Ludden, Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS,
Clerk's Office:

Albany,
July 19, 1949.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

[fol. 498] PROCEEDINGS IN THE SUPREME COURT OF CHEMUNG
COUNTY AFTER REMITTITUR

[fol. 499] ORDER ON REMITTITUR

At a Special Term of the Supreme Court held in and for the County of Chemung at the Supreme Court Chambers in the City of Elmira, New York, on the 9th day of Aug., 1949.

Present: Hon. Bertram L. Newman, Justice.

SUPREME COURT--CHEMUNG COUNTY

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COM-
PANY, *Plaintiff*,

against

MARION J. SLOCUM, as General Chairman of Lackawanna Division No. 30 of the Order of Railroad Telegraphers, and Louis J. Carlo, as General Chairman of System Board of Adjustment, Delaware, Lackawanna and Western Railroad, of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, Defendants

The above named defendant Marion J. Slocum as General Chairman of Lackawanna Division No. 30 of the Order of Railroad Telegraphers having appealed to the Court of Appeals of the State of New York from the judgment of [fol. 500] affirmance entered herein in the office of the Clerk of the County of Chemung on the 30th day of November, 1948, pursuant to the order of the Appellate Division of the Supreme Court for the Third Judicial Department entered in the office of the Clerk of the said Appellate Division on the 22nd day of November, 1948, which judgment unanimously affirmed a final judgment of the Supreme Court, Chemung County, entered in the office of the Clerk of Chemung County on the 7th day of March, 1946, and from each and every part of said judgment of affirmance as well as from the whole thereof and the said appeal having been duly argued in the said Court of Appeals, and after due deliberation the Court of Appeals having ordered and adjudged that the judgment so appealed from as aforesaid be affirmed with costs and having further ordered and ad-

judged that the records and proceedings therein be remitted to this Supreme Court, there to be proceeded upon according to law; now on reading and filing the remittitur of the said Court of Appeals herein and on motion of Sayles & Evans, attorneys for the plaintiff herein, it is hereby

Ordered that the order and judgment of the said Court of Appeals be and the same hereby are made the order and judgment of this Court.

Enter:

B. L. Newman, Justice of the Supreme Court.

[fol. 501] Notice of application to the Court for the granting of the above order is hereby waived.

Dated, August 5th, 1949.

John F. Dwyer, M. F., Attorney for Defendant
Marion J. Slocum as General Chairman of Lackawanna Division No. 30 of the Order of Railroad Telegraphers.

JUDGMENT OF AFFIRMANCE

SUPREME COURT—CHEMUNG COUNTY

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, *Plaintiff*,

against

MARION J. SLOCUM, as General Chairman of Lackawanna Division No. 30 of the Order of Railroad Telegraphers, and Louis J. Carlo, as General Chairman of System Board of Adjustment, Delaware, Lackawanna and Western Railroad, of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, Defendants

The above named defendant Marion J. Slocum as General Chairman of Lackawanna Division No. 30 of the Order of [fol. 502] Railroad Telegraphers having appealed to the Court of Appeals of the State of New York from the judgment of affirmance entered herein in the office of the Clerk of the County of Chemung on the 30th day of November, 1948, on the order of the Appellate Division of the Supreme Court for the Third Judicial Department, affirming the

judgment of this Court entered in the office of the Clerk of the County of Chemung on the 7th day of March, 1946, and from each and every part of said judgment of affirmance as well as from the whole thereof, and the said appeal having been duly argued in the said Court of Appeals and after due deliberation the Court of Appeals having ordered and adjudged that the judgment of the Appellate Division of the Supreme Court so appealed from herein as aforesaid be affirmed with costs and having further ordered and adjudged that the records and proceedings therein be remitted to this Supreme Court there to be proceeded upon according to law, and the remittitur from the said Court of Appeals having been filed herein and an order having been entered herein making the order and judgment of the said Court of Appeals the order and judgment of this Court, and the costs of the plaintiff on said appeal having been duly taxed at the sum of \$131.52, now, on motion of Sayles & Evans, attorneys for the plaintiff, it is

Adjudged that the order and judgment of the Court of Appeals be and the same hereby are made the order and [fol. 503] judgment of this Court and that the judgment of the Appellate Division entered in the office of the Clerk of the County of Chemung the 30th day of November, 1948, so appealed from be and the same hereby is affirmed with costs and that the plaintiff, The Delaware, Lackawanna and Western Railroad Company, recover of the defendant Marion J. Slocum as General Chairman of the Lackawanna Division No. 30 of the Order of Railroad Telegraphers the sum of \$131.52, its costs on said appeal as taxed, and have execution therefor.

Judgment this 9th day of August, 1949.

Thos. B. Bowlby, Clerk.

CLERK'S CERTIFICATE

STATE OF NEW YORK,

County of Chemung, ss:

The undersigned, being the Clerk of the County of Chemung, State of New York, and the Clerk of the Supreme Court in said County of Chemung, does hereby Certify that the foregoing record is a true copy of the Remittitur of the Court of Appeals herein, including the record and proceedings transmitted to my office by the Court of Appeals, and

now on file in my office; I further Certify that the papers attached thereto are true and exact copies of an order of the Supreme Court of Chemung County making the order and judgment of the Court of Appeals the order and judgment of said Supreme Court and of the final judgment of affirm-[fol. 504] ance entered by the said Supreme Court of Chemung County, the originals of said order and judgment being on file in my office.

Dated: October 13, 1949.

Thos. B. Bowlby, Clerk of the County of Chemung,
N. Y. (Seal.)

OPINIONS OF THE COURT OF APPEALS

[fol. 505] DELAWARE, LACKAWANNA & WESTERN RAILROAD
COMPANY, Respondent,

v.

MARION J. SLOCUM, as General Chairman of Lackawanna
Division No. 30 of the Order of Railroad Telegraphers,
Appellant, et al., Defendants

Decided July 19, 1949

CONWAY, J.:

Defendant Marion J. Slocum appeals by our permission from a unanimous judgment of the Appellate Division, Third Department, affirming a declaratory judgment of the Supreme Court, Chemung County, which declared that three "crew-callers" in the Elmira yard office of the plaintiff railroad "and the positions held by them and the work assigned to them" are within plaintiff's agreement with the above-named clerks' union. The Supreme Court also held that the telegraphers' union and its members were estopped by their acts and conduct as well as by their agreements from claiming the "crew-callers" positions or any of the work assigned to those positions.

While the telegraphers' union (which is the only appellant) does not concede that the decision below was correct "on the merits", it has admittedly only asked for a review of two of its contentions below, viz.:

1. That the "National Railroad Adjustment Board" (hereinafter called the Board) has *exclusive* jurisdiction

under the Railway Labor Act (U. S. Code, tit. 45, §§ 151 *et seq.*) to determine this controversy, so that the Supreme Court was without power to do so, and

2. Assuming the Supreme Court has jurisdiction, its exercise of that jurisdiction was an abuse of judicial discretion as a matter of law.

[fol. 506] The facts which have been affirmed by the Appellate Division are as follows:

Defendants are the principal officers of the local units of the above-named unions which are the collective bargaining agents for certain employees in the Elmira yard of the railroad. Each union has a written agreement with the railroad. Each contract contains a general provision, known as a "Scope Rule", which defines those kinds of work to be performed by members of the union, and a provision listing those positions in the Elmira yard which are to be held by employees represented by the union.

This controversy arose over the work performed by three crew callers in the Elmira yard office. Those employees were members of the clerk's union and their positions were listed in the contract between that union and the railroad. The telegraphers' union contended that some work performed by the crew callers was covered by the scope rule of the telegraphers' contract, and on June 4, 1942, the telegraphers' chairman requested that the work in question be reassigned to members of the telegraphers' union and that retroactive pay for past work be paid to men on the telegraphers' extra-list. The railroad has maintained that none of the work performed by the crew callers was covered by the scope rule of the telegraphers' contract. The chairman of the clerks' union has consistently maintained that the work of the crew callers was covered by the clerks' contract, and that any telegraphers' duties which they might be performing should be reassigned.

The chairman of the telegraphers' union had pressed its claim in conferences and correspondence with various officials of the railroad, including the general superintendent and the general manager. At this point, on March 3, 1944, the railroad commenced this action against the general chairmen of the two unions for a judgment declaring the respective rights and obligations of the railroad and the unions under the collective bargaining agreements. The complaint alleged that a controversy existed between the

telegraphers' union and the clerks' union as to whether the work of the crew callers was covered by the railroad's contract with the telegraphers or by the contract with the clerks, and the railroad believed that all work performed by the crew callers was covered by the contract with the clerks.

It may be pointed out that after the commencement of this action the defendant telegraphers' union made an application at Special Term for an order approving a bond and directing the removal of the action to the United States District Court. The application was denied. (183 Misc. 454.)

Thereafter a bond was submitted to a Judge of the United States District Court for the Western District of New York and approved by him. The railroad appeared specially and [fol. 507] moved to remand the case to our Supreme Court, and the telegraphers' union moved to dismiss the action. The motion to dismiss was denied and the railroad's motion to remand the case to our State court was granted. (56 F. Supp. 634.)

On February 5, 1945, the telegraphers' union made a motion at Special Term to dismiss the complaint which was denied in an unreported memorandum. On appeal to the Appellate Division the order was unanimously affirmed in an opinion reported in 269 Appellate Division 467.

As already noted, the action was tried before a Justice of the Supreme Court without a jury, and upon his findings and conclusions a judgment was entered which sustained the railroad's construction of the contracts and held that the telegraphers' union was estopped from claiming the positions in controversy. The Appellate Division has affirmed in a *Per Curiam* opinion. (274 App. Div. 950.)

In each of the above five instances, the telegraphers' union urged that the State Supreme Court had no jurisdiction to entertain the action and that plaintiff's only recourse was to pursue its administrative remedy under the Railway Labor Act. Thus, that contention has been rejected on five occasions and by all the judges who have examined it.

As was pointed out in several of the above-mentioned opinions, plaintiff seeks no rights under the Railway Labor Act, but brings this action only for a construction or interpretation of the contracts between the parties. (183 Misc. 454; 56 F. Supp. 634, 637; 274 App. Div. 950.)

The Railway Labor Act provides that among its "General purposes" is the prompt and orderly settlement of all

disputes between railroads and their employees. It divides disputes into two classifications as follows: (1) those "concerning rates of pay, rules, or working conditions" and (2) those "growing out of grievances or out of the interpretation or application of *agreements* covering rates of pay, rules, or working conditions." (U. S. Code, tit. 45, § 151a, cls. [4], [5].) (Emphasis supplied.)

The parties to *all* disputes are initially required to attempt to negotiate their differences by conferences between their respective representatives. (U. S. Code, tit. 45, § 152, subds. First, Second.)

Beyond the initial stage of negotiation and conference the act provides for different methods of settlement for the two classes of disputes. As pointed out in *Elgin, Joliet & Eastern Ry. Co. v. Burley* (325 U. S. 711, 723) the first type "relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights [fol. 508] claimed to have vested in the past." Concerning that class of disputes the act provides first for mediation before the National Mediation Board, if that fails, then voluntary arbitration; and if that fails, conciliation by Presidential intervention. (U. S. Code, tit. 45, §§ 155, 157, 160; see *Burley* case, *supra*, p. 725.)

The second class of disputes "contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one." (*Burley* case, *supra*, p. 723.) All parties and the courts below agree that the instant case is within the second classification, and that the course prescribed by the act for the settlement of this type of dispute is submission to the Railroad Adjustment Board. The language of the act is as follows (U. S. Code, tit. 45, § 153, subd. First, par. [i]): "(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing, to reach an adjustment in this manner, the disputes

may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." (Emphasis supplied.) It will be noted that the wording of the statute with respect to the submission of disputes to the Board is "may be referred" which is clearly not-mandatory.

Moreover, the Supreme Court of the United States has held in *Moore v. Illinois Central R. R. Co.* (312 U. S. 630) that the jurisdiction of the Board is *not* exclusive. In holding that a union member, who sued the railroad for wrongful discharge in violation of a collective bargaining agreement, did not first have to exhaust his administrative remedies under the Railway Labor Act, the court said (p. 635-636): "It is to be noted that the section pointed out, § 153 (i), as amended in 1934, provides no more than that disputes 'may be referred . . . to the . . . Adjustment Board . . .'. It is significant that the comparable section of the 1926 Railway Labor Act (44 Stat. 577, 578) had, before the 1934 amendment, provided that upon failure of the parties to reach an adjustment a 'dispute shall be referred to the designated Adjustment Board by the parties, or by either party . . .'. This difference in language, substituting 'may' for 'shall,' . . . is not, we think, an indication of a change in policy, but was instead a clarification of the law's original purpose. For neither the original 1926 Act, nor the Act as amended in 1934, indicates that the [fol. 509] machinery provided for settling disputes was based on a philosophy of legal compulsion. On the contrary, the legislative history of the Railway Labor Act shows a consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature. The District Court and the Circuit Court of Appeals properly decided that petitioner was not required by the Railway Labor Act to seek adjustment of his controversy with the railroad as a prerequisite to suit for wrongful discharge."

Appellant argues in its brief as it did on the oral argument that recent cases in the Supreme Court of the United States demonstrate that the *Moore* case (*supra*) "will be limited in the future to the precise facts that were there considered" and that "it may confidently be predicted that the Supreme Court will hold the jurisdiction of the statutory tribunals to be exclusive in the absence of extraordi-

nary circumstances calling for the intervention of equitable remedies." However, we may not speculate as to what the Supreme Court will hold in the future, and until the *Moore* case is limited to its facts or overruled, we should follow it, as have the courts below. (183 Misc. 454, 456-457; 269 App. Div. 467, 469; 274 App. Div. 950.)

Major reliance is placed by appellant upon *Order of Ry. Conductors v. Pitney* (326 U. S. 561). That case not only does not support appellant's position, but on the question of the jurisdiction of the courts, it is clearly to the contrary. There, a proceeding for reorganization of a railroad under section 77 of the Bankruptcy Act was pending in the District Court, and the trustees entered into an agreement with the union representatives of "yard conductors" that five freight trains which had been manned by "road conductors" should thereafter be manned by "yard conductors". The representative of the "road conductors", relying on earlier agreements, and alleging that the proposed displacement violated section 6 of the Railway Labor Act which prohibited such changes without thirty days' notice and action by the Mediation Board, petitioned the court to instruct the trustees not to displace the road conductors and to enjoin such action as long as the earlier agreements were not altered in accordance with the Railway Labor Act. The District Court determined that the "yard conductors" were entitled to man the trains in question and dismissed the petition on the merits.

The Circuit Court of Appeals held that the petition should be dismissed on jurisdictional grounds because it thought that the remedies of the Railway Labor Act for the settlement of such disputes were exclusive, and that if it was mistaken on the jurisdictional question, then it agreed with the District Court that the petition should be dismissed on the merits. (145 F. 2d 351.)

The United States Supreme Court in reversing held that the District Court "might act in two distinct capacities." [fol. 510] First, it might do so as a judicial body in "possession of the business" or a "carrier" within the meaning of section 1 of the Railway Labor Act. As such it would have to interpret the contract to exercise its jurisdiction under the Bankruptcy Act to control its trustee and preserve the debtor's estate. Thus, the order was affirmed insofar as it constituted instructions to the trustees, since that

action was within the supervisory power of the District Court, as a bankruptcy court, and amounted to no more than a decision by the carrier itself. However, those instructions would not settle the dispute, and in its second capacity "the reorganization court would have to act in the further capacity of a tribunal empowered to grant the equitable relief sought" (p. 565), even though such action required an interpretation of the contracts. However, Congress having created the Board as an "agency especially competent and specifically designated to deal with" such a dispute, "the court should exercise equitable discretion to give that agency the first opportunity to pass on the issue. Certainly the extraordinary relief of an injunction should be withheld, at least, until then." (P. 567.) Accordingly the dismissal of the petition was stayed "so as to give an opportunity for application to the Adjustment Board for an interpretation of the agreements." (P. 568.)

Thus the *Pitney* case (*supra*) recognized the concurrent jurisdiction of the board and the courts to interpret the contracts, but held that the equity court *in the exercise of its discretion* should have stayed its hand under the circumstances of that case which included the fact that the court was acting in two capacities.

Moreover, there are a number of instances since the passage of the act where the courts of other States have taken jurisdiction of controversies involving the construction of agreements between a railroad and its employees. (*Evans v. Louisville & Nashville R. R. Co.*, 191 Ga. 395; *Southern Ry. Co. v. Order of Ry. Conductors of America*, 210 S. C. 121; *Wooldridge v. Denver & R. G. W. R. Co.*, 118 Col. 25; *Louisville & Nashville R. R. Co. v. Bryant*, 263 Ky. 578; *Burton v. Oregon-Washington R. R. & Navigation Co.*, 148 Ore. 648. See *Swartz v. South Buffalo Ry. Co.*, 44 F. Supp. 447.)

Thus, the challenge to the jurisdiction of the Supreme Court must fail, and the only remaining question is whether the failure to dismiss the action was an abuse of discretion as a matter of law.

We think not. In *New York Post Corp. v. Kelley* (296 N. Y. 178, 189-190) we said recently: "Where no mandatory statute is applicable, the Supreme Court determines its own practice. (Judiciary Law, § 82 [now § 83].) Rule

212 of the Rules of Civil Practice reads as follows: 'Rule 212. *Jurisdiction discretionary*. If, in the opinion of the court, the parties should be left to relief by existing forms of actions, or for other reasons, it may decline to pronounce a [fol. 511] declaratory judgment, stating the grounds on which its discretion is so exercised.' This court is one of review, and we may not reverse the orders because of the exercise of the discretion committed to the Supreme Court through legislative provision unless we may say that there was an abuse of discretion as a matter of law: * * * The following, from *Rockland Light & Power Co. v. City of New York* (Lehman, Ch. J.), *supra*, p. 50, is apposite here: 'The sufficiency of the complaint has been sustained as a pleading. The order accomplishes nothing more. The order must be affirmed, regardless of the merits of the controversy or the scope of the plaintiff's rights, if we conclude that the complaint in an action for declaratory judgment should not be dismissed as "matter of law" where the facts alleged show the existence of a controversy concerning "rights and legal relations" and where it appears that the discretionary and extraordinary powers of the court have been invoked for a sufficient reason.' "

While the Railroad Adjustment Board may be peculiarly qualified to determine this controversy, "sufficient reason" appears for the Supreme Court to have exercised the discretion committed to it by the Legislature to pronounce a declaratory judgment.

First, there is at least some doubt whether the procedure under the Railway Labor Act is adequate to bind all three parties to this action. The Justice at Special Term did not think so when he denied appellant's application for removal of the action to the Federal District Court. (183 Misc. 454.) Likewise, the Federal District Judge in remanding the case back to our Supreme Court said (56 F. Supp. at p. 636): "The Railway Labor Act (Sec. 153 First Division (i), *supra*, relates to 'the disputes between an employee or groups of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, * * *'. The dispute here asserted is between the Order of Railroad Telegraphers and the Brotherhood of Railway and Steamship Clerks and not between the plaintiff and either of said organizations; and no dispute here arises concerning 'rates

of pay, rules, or working conditions.' While it is true that either of the aforesaid organizations could bring proceedings under the aforesaid provisions of the Railway Labor Act, it is not obligatory upon either of these so to do nor is there any way in which the plaintiff can compel the initiation of such a proceeding. The Railway Labor Act does not provide that the plaintiff can bring the claims jointly before the Railroad Adjustment Board for determination or that the plaintiff can make the second association a party to the proceedings so that it will be bound by decision rendered by the National Adjustment Board."

In denying appellant's motion to dismiss the complaint [fol. 512] which was made on the ground that the dispute should be decided by the Adjustment Board, the Trial Justice then sitting at Special Term also decided "that it is questionable if the relief there afforded is adequate."

While the United States Supreme Court in the *Pitney* case (*supra*), held that the equity court should have refrained from deciding the controversy between the two unions and the railroad until an application for an interpretation of the agreements was made to the Adjustment Board, the question of whether a proceeding in the nature of an interpleader was available before the Board does not appear to have been specifically raised and decided.

Secondly, while the dispute here reached the initial conference stage, no proceeding was ever instituted before the Adjustment Board. This is not a case where a declaratory judgment is being sought to stay the hand of an administrative agency so that the courts may pass on a question of law as to the jurisdiction of the agency, e. g., *New York Foreign Trade Zone Operators v. State Liq. Authority* (285 N. Y. 272); *Dun & Bradstreet v. City of New York* (276 N. Y. 198); *Aerated Products Co. v. Godfrey* (263 App. Div. 685, revd. on other grounds 290 N. Y. 92); *Booth v. City of New York* (296 N. Y. 573). Nor is it like *New York Post Corp. v. Kelley* (*supra*) in the sense that the court is being asked to pass upon a question of fact upon which depends the jurisdiction of the administrative board while a proceeding is pending before the board.

Rather this is a case where there is at most concurrent jurisdiction by the Adjustment Board and the State Supreme Court, over the parties and the subject matter, and

before any proceeding has been instituted before the Board, the plaintiff has seen fit to ask merely for an interpretation of the agreements between the parties in an action for a declaratory judgment in the Supreme Court. Plaintiff is not attempting to oust the Board of jurisdiction by urging a question of law or fact that the Board is without jurisdiction. In *Woollard v. Schaffer Stores Co.* (272 N. Y. 304, 311-312) we said: "The Supreme Court may, of course, exercise its discretion in refusing to proceed to a declaratory judgment when other remedies are adequate and that is all we held in *Newburger v. Lubell* (257 N. Y. 383). When, however, another action between the same parties, in which all issues could be determined, is actually pending at the time of the commencement of an action for a declaratory judgment, the court abuses its discretion when it entertains jurisdiction. (*Colson v. Pelgram*, 259 N. Y. 370.) We have never gone so far as to hold that, when there exists a genuine controversy requiring a judicial determination, the Supreme Court is bound, solely for the reason that another remedy is available, to refuse to exercise the power conferred by section 473 and rule 212. Here a genuine controversy existed, and the parties were unable to determine definitely the nature which the litigation should assume. * * * The numerous issues arising from the pleading are sufficient to confer upon the court power to entertain jurisdiction and to decide them all in this single action. While it had discretion to refuse jurisdiction it was not bound so to do."

Thirdly, there is justification for a retention of jurisdiction by the Supreme Court because as stated by the Trial Justice when he denied appellant's motion to dismiss: "The controversy arose out of work performed at Elmira and there seems to be no reason why the plaintiff should be compelled to go to the National Railroad Adjustment Board at Chicago, with the attendant delays, especially in view of the fact that it is questionable if the relief there afforded is adequate. The condition of the court calendar here, where the controversy arose, is such that the case can be disposed of expeditiously and at the convenience of the respective parties, affording full, adequate and prompt relief."

The Appellate Division in affirming that order likewise said (269 App. Div. 467, 469): "The courts of this State furnish a more convenient forum for the trial of the issues

than the statutory board which functions in a distant State. Under such conditions, plaintiff should not be denied the right to litigate here and obtain a judgment declaratory of its obligations under the contracts. (*Rockland Light and Power Co. v. City of New York*, 289 N. Y. 45; *Woollard v. Schaffer Stores Co.*, 272 N. Y. 304.)"

Finally, the courts of other States have awarded declaratory relief in similar cases. (*Louisville & Nashville R. R. Co. v. Bryant*, 263 Ky. 578, *supra*; *Southern Ry. Co. v. Order of Ry. Conductors of America*, 210 S. C. 121, *supra*).

The judgment should be affirmed, with costs.

DESMOND, J. (dissenting):

By this declaratory judgment the Supreme Court of this State, has, at the suit of plaintiff railroad company, construed the labor agreements of plaintiff with two defendant railway unions and, in an attempt to settle a jurisdictional dispute between those unions, has held that under such agreements one of the unions (Brotherhood of Clerks, etc.) is entitled to claim, as against the other (Railroad Telegraphers), certain jobs in the service of plaintiff railroad company at its Elmira, N. Y., yard office. The Supreme Court of the United States, however, ruled, in *Order of Ry. Conductors v. Pitney* (326 U. S. 561) that under the applicable Federal statute (Railway Labor Act; U. S. Code, tit. 45, § 151 *et seq.*) such determinations are not the business of the courts but of the Railroad Adjustment Board set up by Congress in that statute. The *Pitney case* (*supra*) as I read it, makes this plain and clear. The Supreme Court said (326 U. S., p. 566): "Not only [fol. 514] has Congress thus designated an agency peculiarly competent to handle the basic question here involved, but as we have indicated in several recent cases in which we had occasion to discuss the history and purpose of the Railway Labor Act, it also intended to leave a minimum responsibility to the courts." The basic question in the *Pitney case* was exactly the question here, and the Supreme Court said in so many words that the United States District Court should not have interpreted the labor agreements for the purposes of adjudicating the dispute between the unions and the railroad, but should have left all that to the Board. The Supreme Court pointed out (326 U. S. 566) that in order to decide that basic question,

the court would have to interpret the collective bargaining agreements in dispute, and that such interpretation involved more than the mere construction of a document but had to be made in the light of other agreements and in the light of usage, practice and custom. In two recent cases, the Eighth Circuit Court of Appeals has construed the *Pitney* decision to mean just that, and in each instance the Supreme Court denied certiorari (*Order of R. R. Telegraphers v. New Orleans, Texas & Mexico Ry. Co.*, 156 F. 2d 1, certiorari denied 329 U. S. 758; *Missouri-Kansas-Texas R. R. v. Randolph*, 164 F. 2d 4, certiorari denied 334 U. S. 818). A number of Federal District Court opinions are of like tenor (see for instance *Illinois Central R. R. Co. v. Brotherhood of R. R. Trainmen*, 83 F. Supp. 930, 933).

In the *Pitney* case (*supra*), the Federal District Court, sitting in bankruptcy, had construed contracts of the railroad with the two unions involved as meaning that one of those unions should have the contested jobs, and the petition of the other union was, accordingly, dismissed. The Circuit Court of Appeals (145 F. 2d 351) reversed the District Court, holding that the petition should be dismissed not on the merits, but on jurisdictional grounds, holding that the remedies of the Railway Labor Act were exclusive. The Supreme Court then took the *Pitney* case in certiorari. It said (326 U. S. 567) that the District Court could not interpret the agreements but could do no more than hold the case until the Adjustment Board should hand down such an interpretation, at which time, the Supreme Court said, the District Court might, depending on the situation then existing, use its discretionary powers to grant an injunction if appropriate. In the case we have before us, the trial court granted no injunction or other relief—its judgment is nothing more or less than a declaration as to the meaning of these collective bargaining agreements and their application to the facts. In other words, the trial court did, here, exactly what the Supreme Court said it was improper for any court to do: take unto itself a function reserved by Congress to the Adjustment Board. It does not seem to me to make any great difference whether we label this "want of jurisdiction" or "abuse of discretion". Whatever be the appropriate label, this declaratory judgment cannot, under [fol. 515] the rule of the *Pitney* case, stand, and we are just as much bound to reverse for this kind of abuse of dis-

cretion (see *Colson v. Pelgram*, 259 N. Y. 370, 377) as for an absolute lack of jurisdiction. The fundamental question here is the one stated by the Supreme Court under different circumstances in *California v. Zook* (336 U. S. 725, 729): "does the state action conflict with national policy?" The national policy here has been formulated by Congress and declared by the Supreme Court. The supremacy clause (U. S. Const., art. VI) and ordinary comity (*Bourjois Sales Corp. v. Dorfman*, 273 N. Y. 167, 171) prevent the State courts from following a different one, of their own making?

It is of course true that, in the *Pitney* case (*supra*), the Supreme Court dealt with another, separate, question besides the one above set out. The railroad, in the *Pitney* case, was in bankruptcy and was being operated by trustees appointed by the District Judge, so that, besides its ordinary judicial function, the District Court had the power and the duty to instruct the trustees in the running of the railroad. The Supreme Court held that, acting in the latter role, "the District Court had supervisory power to instruct its trustees" as to these contracts. The Supreme Court, however, was at pains to point out that the court's instructions to its trustees were "no more binding on the Adjustment Board than the action of any other carrier" and said flatly that despite the court's power and duty to give such instructions, it "should not have interpreted the contracts for purposes of finally adjudicating the dispute between the unions and the railroad", and ordered the District Court to hold the case until the union's petition could go to the Adjustment Board and the agreements could be there interpreted (326 U. S., pp. 567, 568). The *Pitney* opinion, therefore, deals with two separable and separated questions, and its holding that the dispute had to go to the Adjustment Board was not based on, or in any way affected by, the circumstance that the particular railroad was being operated by agents of the District Court. Justice Rutledge's dissenting opinion in the *Pitney* case agrees that the matter of interpretation was not for the court, but goes further and urges that the court should grant a temporary injunction to preserve the *status quo* in all respects until the Adjustment Board should hand down its decision.

Moore v. Illinois Central R. R. Co. (312 U. S. 630) decided five years before the *Pitney* case (*supra*)—the majority opinions in both cases were written by Justice Black—is

not mentioned in the *Pitney* opinions and does not conflict at all with the *Pitney* rule. The *Moore* case was, as the Supreme Court itself described it in *Order of R. R. Telegraphers v. Railway Express Agency* (321 U. S. 342, 348) "a common-law action to recover wages". In other words, *Moore*, a railroad employee, brought, as was his absolute right, a common-law action for damages for an alleged wrongful discharge. The Supreme Court held that the Railway Labor Act grant of exclusive jurisdiction to the [fol. 516] Board to construe railway labor contracts, did not prevent the bringing of such a suit and that, once the suit was properly before the court, it had to be decided; and, if the course of decision required an interpretation of contracts, the common-law court could make such a construction. But when, as here, the sole purpose of the suit, and the sole judgment entered, is a statement of the meaning of such contracts, then there is nothing that a court may or should do except see to it that the dispute goes to the Adjustment Board where it belongs. If the Supreme Court in the *Pitney* case had concluded that the *Pitney* situation was the same as the *Moore* situation except for the circumstance that the railroad in the *Pitney* case was in bankruptcy, the court certainly would have said so, and not let the *Moore* case go unmentioned in the *Pitney* opinion.

The judgment should be reversed, with costs.

Loughran, Ch. J., Lewis, Dye and Bromley, JJ., concur with Conway, J.; Desmond, J., dissents in opinion in which Fald, J., concurs.

Judgment affirmed.

[fol. 517] Clerk's and Reporter's Certificates to foregoing paper omitted in printing.

[fol. 518] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1949

No. 391

ORDER ALLOWING CERTIORARI—Filed December 5, 1949

The petition herein for a writ of certiorari to the Court of Appeals of the State of New York is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Douglas took no part in the consideration or decision of this application.

Endorsed on Cover: File No. 54,140, New York, Court of Appeals. Term No. 391. Marion J. Slocum, as General Chairman, Lackawanna Division No. 30 of the Order of Railroad Telegraphers, Petitioner, vs. The Delaware, Lackawanna & Western Railroad Company. Petition for writ of certiorari and exhibit thereto. Filed October 14, 1949. Term No. 391, O. T. 1949.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

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CHARLES ELMORE CROPLEY
CLERK

No. 391

391

MARION J. SLOCUM, AS GENERAL CHAIRMAN, LACKAWANNA DIVISION NO. 30 OF THE ORDER OF RAILROAD TELEGRAPHERS,

Petitioner,

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK, AND BRIEF IN SUPPORT THEREOF

LEO J. HASSENAUER,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 391

MARION J. SLOCUM, AS GENERAL CHAIRMAN, LACKAWANNA DIVISION NO. 30 OF THE ORDER OF RAILROAD TELEGRAPHERS,

vs.

Petitioner,

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK, AND BRIEF IN SUPPORT THEREOF

To the Honorable the Chief Justice and Associate Justices of Supreme Court of the United States:

The petition of Marion J. Slocum, as General Chairman, Lackawanna Division No. 30 of The Order of Railroad Telegraphers, respectfully shows:

I

The Matter Involved

The petitioner in this case challenges the action of the Supreme Court of the State of New York in entertaining

jurisdiction to determine a controversy concerning the interpretation of a collective bargaining agreement which had been entered into by the respondent railroad and The Order of Railroad Telegraphers, a railroad labor organization, national in scope, of which the petitioner is an official. The collective bargaining agreement was entered into pursuant to the provisions of the Railway Labor Act (48 Stat. 1185; 45 U.S.C.A. 151 *et seq.*). The petitioner contends that exclusive jurisdiction to determine controversies of this type between such parties has been vested in the tribunals set up by the Act, particularly the National Railroad Adjustment Board. The questions presented are of major importance in the field of labor law.

II

Proceedings in the Courts

A dispute arose between the respondent railway and the petitioner (who hereafter will be referred to as the telegraphers organization), with respect to the interpretation of a collective bargaining agreement entered into by the parties effective January 1, 1929 (R. 396) and amended as of May 1, 1940 (R. 463). The controversy involved a claim by the telegraphers organization that certain positions in the Elmira railroad yards fell within the scope rule of its agreement. The respondent countered with the assertion that the positions were within the scope rule of an agreement entered into by the respondent and the Brotherhood of Railway Clerks on October 1, 1934, which was also subsequently extended (R. 422, 438). Pursuant to Sec. 3 (i) of the Railway Labor Act, the telegraphers organization attempted to obtain a determination of the controversy by the appropriate official of the company, as a preliminary to the submission of the controversy to the National Railroad Adjustment Board. No such determination was made.

Respondent instead commenced an action in the Supreme Court of the State of New York seeking a declaratory judgment in interpreting the two contracts in question, both organizations being made defendants. Respondent maintained that without a declaration by the court that all of the work of the employees involved came exclusively within either one of the agreements, it would be subjected to a multiplicity of claims, and that the organization of employees whose rights were not recognized would progress a claim that respondent had violated the agreement and present the dispute under the Railway Labor Act to the appropriate Division of the National Railroad Adjustment Board (R. 18, 19). Respondent further alleged it had no adequate remedy at law, and no adequate remedy before the Adjustment Board whereby it could jointly bring the claims of both organizations before the Adjustment Board. Respondent further alleged that, in the event either organization should file a submission of the dispute with the Adjustment Board, respondent could not implead or make the other organization a party thereto. (R. 20, 21)

After an unsuccessful attempt by the telegraphers to remove the cause to the United States District Court, the case was tried before a justice of the Supreme Court at an equity term without a jury. The trial court denied both defendants' motions to dismiss the case (R. 176), and granted judgment in favor of respondent, interpreting both collective bargaining agreements in the manner requested by it. (R. 338)

In the course of a preliminary opinion upholding the jurisdiction of the State Court, the trial justice wrote:

"The controversy arose out of work performed at Elmira and . . . there seems to be no reason why the plaintiff should be compelled to go to the National Railroad Adjustment Board at Chicago with the at-

tendant delays, especially in view of the fact that it is questionable if the relief there afforded is adequate. The condition of the court calendar here, where the controversy arose, is such that the case can be disposed of expeditiously and at the convenience of the respective parties, affording full, adequate and prompt relief." (R. 34, 36, 37)

—The Court of Appeals quoted with approval this part of the trial court's opinion (R. 520).

Parenthetically, the clerks organization throughout the litigation joined the telegraphers in challenging the jurisdiction of the State courts, even though the decision of the trial court was favorable to its position as to the merits of the controversy. No appeal was taken by the clerks from the judgment of the trial court, and they are no longer parties to this litigation.

Thereafter, the telegraphers appealed to the Appellate Division of the Supreme Court, Third Department, which unanimously affirmed the judgment of the trial court. Pursuant to New York statute, application was then made to the Appellate Division for leave to appeal to the Court of Appeals. This was denied. Application for the same relief was thereupon made to the Court of Appeals and permission was granted by that Court (R. 395). Upon the appeal, the judgment was affirmed by a divided court. Five judges held that the state courts had concurrent jurisdiction to determine such a controversy, and two judges were of the opinion that such jurisdiction was exclusively vested in the National Railroad Adjustment Board. The opinions of the Court of Appeals will be found at R. 504. The applicable provisions of the Railway Labor Act and Rule 212 of the New York Civil Practice Act, governing actions for declaratory judgments, are set forth in an appendix to the brief submitted with this petition.

III

The Questions Presented

1. Whether Congress left to State and Federal courts power to exercise concurrent jurisdiction with the National Railroad Adjustment Board in determining disputes between an organization of employees and a carrier growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions?

2. As a corollary to the question just stated, whether this Court intended, in *Order of Railway Conductors v. Pitney* 326 U. S. 561, to limit the doctrine established in *Moore v. Illinois Central R. Co.*, 312 U. S. 630?

3. Is not a State court required to follow the public policy of the Railway Labor Act as interpreted by this Court, by refusing to entertain jurisdiction in any case until the matter has first been submitted to the National Railroad Adjustment Board?

4. Does the present complaint state a proper cause of action for declaratory judgment when it is affirmatively alleged that no application for relief was made by the respondent carrier or by either of the organizations of employees to the National Railroad Adjustment Board?

5. Whether the interpretation of the respective collective bargaining agreements by the state court is binding on the National Railroad Adjustment Board?

IV

Jurisdiction

The jurisdiction of this Court is based upon title 28 U.S.C.A. Sec. 1257-(3). The judgment of the Court of

Appeals was entered on July 19, 1949, and the judgment of the Supreme Court of the State of New York making the judgment of the Court of Appeals the final judgment in the case, was entered on the 9th day of August, 1949.

V

The Reasons Relied Upon For the Allowance of the Writ

1. The question presented with reference to the exclusive jurisdiction of the National Railroad Adjustment Board to interpret collective bargaining agreements between carriers and railroad labor organizations is one which has not been squarely passed upon by this Court. The importance of this question in the administration of the Railway Labor Act, and in the day-to-day working relations between carriers and labor organizations can hardly be overemphasized. The public considerations involved are stressed in both the prevailing and dissenting opinions of the Court of Appeals.

2. The decision in the present case is in conflict with the decision of this Court in *Order of Railway Conductors v. Pitney*, 326 U. S. 561. It was there held that Section 3 of the Railway Labor Act requires the courts to refuse jurisdiction of this type of controversy prior to submission to the National Railroad Adjustment Board.

Judge Desmond, in his dissenting opinion, points out that the state courts are bound by the public policy of a federal statute as interpreted by this Court. He concludes that the case should have been dismissed because the acceptance of jurisdiction violated a national policy as declared by this Court in the *Pitney* case. He, therefore, found it unnecessary to distinguish between "want of jurisdiction" and "abuse of discretion" in reaching his determination. In that view of the matter, which we submit to be correct, the case presents important and far-reaching

questions of the relation between the Federal and State judiciaries in a field of Federal cognizance.

3. Because of the claimed conflict between the *Pitney* case and earlier case of *Moore v. Illinois Central Railroad*, 312 U. S. 630, it is respectfully submitted that the subject is one which urgently requires clarification by this tribunal.

It is the contention of the petitioner that the rule enunciated in the *Moore* case was intended to apply only to that particular type of controversy, which this Court correctly described in *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U. S. 342, 348; 64 Sup. Ct. Rep. 582, 586, as being a "common-law action to recover wages."

4. The decision of the Court of Appeals conflicts with the decisions of this Court in *Bethlehem Steel Co. v. N.Y. State Labor Relations Board*, 330 U. S. 767, and *LaCrosse Telephone Co. v. Wisconsin Employ. Rel. Bd.*, 336 U. S. 18.

It was there held that where the Federal Authority has occupied the field, the right of the state to legislate in the same field is suspended. It is submitted by the petitioner that the same principle applies to action by state courts in a field occupied by tribunals created by federal enactment.

The respondent carrier is concededly engaged in interstate commerce. The industry is one over which the Railway Labor Act and the several Boards created thereunder has consistently exercised jurisdiction.

5. This is the first occasion that there has been presented to this Court the question of the concurrent jurisdiction of state courts with that of the National Railroad Adjustment Board to consider disputes growing out of the interpretation or application of agreements promulgated under the Railway Labor Act and this important question should be passed upon by this Court.

6. The practical result of the decision to be reviewed will necessarily be to confuse the problem of stabilizing industrial relations in the field of railroad labor. It is very clear that the decision would have been quite to the contrary if the original action for a declaratory judgment had been commenced in the United States District Court, since presumably that Court would have followed the rule of policy established in the *Pitney* case. If the decision be correct, the congressional policy to vest original jurisdiction with the National Railroad Adjustment Board may thus be set at naught by either a carrier or a labor organization. It may confidently be predicted that one interpretation of an agreement will be reached by one tribunal and a contrary interpretation by another. Thus, the very wrongs which the framers of the Act intended to remedy would be continued and a consistent application of the rules and working conditions of such agreements would become impossible.

There is here presented a situation analogous to that which prevailed in a broader area of jurisprudence prior to the decision of this court in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64. It is submitted, therefore, that these practical considerations with respect to the operation of the Railway Labor Act imperatively require a review of the decision below by this Court.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued to review the judgment of the Court of Appeals of the State of New York, in this action.

LEO J. HASSENAUER,
MANLY FLEISCHMANN,
JOHN F. DWYER,
JAMES W. SACK,

Counsel for petitioner.

Dated: October 14, 1949.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 391

**MARION J. SLOCUM, AS GENERAL CHAIRMAN, LACKAWANNA
DIVISION NO. 30 OF THE ORDER OF RAILROAD TELEGRAPHERS,**
Petitioner,
vs.

**THE DELAWARE, LACKAWANNA & WESTERN
RAILROAD COMPANY,**
Respondent

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I

The Railway Labor Act Precludes the Exercise of Jurisdiction by State Courts to Interpret Collective Bargaining Agreements In Disputes Between Carriers and Railroad Labor Organizations

The validity of the Railway Labor Act, which established tribunals and procedures for the prompt determination of labor disputes involving interstate rail carriers, is beyond dispute. This Court has repeatedly upheld these provisions under the constitutional power of Congress to regulate interstate commerce.

Texas & N.O.R. Co. v. Brotherhood of Railway Clerks,
281 U. S. 548;

Virginian Ry. Co. v. System Federation, 300 U. S.
515, 553.

One of the main purposes of the 1934 amendments was to provide a more effective process of settlement. *Elgin J. & E. R. Co. v. Burley*, 325 U. S. 711, 725, 726. This appears clearly both from the structure and language of the Act, and from a consideration of the background of its enactment.

The 1934 amendments incorporated in the present Act were designed to provide a general and inclusive plan for the settlement of *all* railway labor disputes, to quote the specific language of Sec. 2, "General Purposes." The aim was not to dispense with voluntary agreements and settlements between disputing parties, but rather to provide agencies and tribunals for resolving disputes which could not be otherwise determined without prolonged industrial strife. A most important objective of the 1934 amendments was that of attaining uniformity in the interpretation and administration of the law with respect to collective bargaining agreements and the respective rights of carriers and employees, which was only possible by voluntary agreement under the Act of 1926.¹ This uniformity was intended to extend to the promulgation of agreements, the creation of tribunals for interpretation of such agreements, and to the procedure for the resolution of controversies arising under them. Separate tribunals were therefore provided which, it was expected, would be peculiarly fitted to deal with the specific controversies committed to their respective jurisdictions. The plan of the Act in this respect is as follows:

The National Railroad Adjustment Board has general jurisdiction over disputes growing out of grievances, or out of interpretation or application of agreements concerning rates of pay, rules, or working conditions. The

¹ Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L.J. 567 (1937).

Board consists of thirty-six members, eighteen selected by the carriers and eighteen selected by labor organizations of the employees, national in scope, organized in accordance with the provisions of the Act. The Board is divided into four divisions, and it is important to note that a single division, viz., the Third Division, has jurisdiction over both telegraphers and clerical employees (Sec. 3 (h)). The contention of the respondent that it might be subjected to conflicting awards is thus without merit.

The Act further specifies a complete procedure for the handling of claims of this type. The first step in the administrative procedure is the referral of the complaint through normal channels to the chief operating officer of the carrier (Sec. 3 (i)), that being the exact procedure initiated by the petitioner before the commencement of the present action. (R. 358, 361, 365, 366, 368, 374, 376, 377, 378, 379, 381, 382.) If adjustment is not reached in this phase of the procedure, either party may refer the matter to the appropriate division of the Adjustment Board. Awards of the Adjustment Board may be enforced by appropriate action in the United States District Court (Sec. 3 (p)).

The second major tribunal created by the Act is the National Mediation Board (Secs. 4, 6). A principal function of this Board is the mediation, adjustment and, if necessary, the determination of representation cases, i.e., jurisdiction disputes between unions and carriers.

It may be pointed out in passing that it is frequently difficult to determine exactly which type of controversy is involved in a particular case, since a single dispute may involve questions of interpretation or application of contracts as well as questions of policy with respect to representation. Such problems will be found to be implicit in

the present case. See Pg. 314 of the Record where it is pointed out that the present controversy is basically a jurisdictional dispute, not justiciable in a court of law. This Court has flatly held that such disputes are not within the jurisdiction of any court. *General Committee, etc., v. M.K.T. R. Co.*, 320 U. S. 323.

Applying the usual rules of interpretation applied to federal legislation under the commerce clause by this Court, it would seem clear that the jurisdiction of the statutory administrative tribunals was intended to be exclusive. *Bethlehem Steel Co. v. N.Y. State Labor Rel. Bd.*, 330 U. S. 767; *LaCrosse Telephone Co. v. Wisconsin Employment Rel. Bd.*, 336 U. S. 18. Before proceeding to a discussion of the particular case relied upon by the respondent and by the courts below as establishing a contrary rule (*Moore v. Illinois Central R. Co.*, 312 U. S. 630), we call attention to a few of the factors which seem to indicate that Congress certainly intended the jurisdiction conferred upon these tribunals, to be exclusive in a controversy such as is here considered.

In the first place, the history of the Act, and the purposes expressed in Sec. 2 seem to be conclusive on this subject. As was said by this Court in *General Committee, etc., v. M.K.T.R. Co.*, supra, at page 337, in considering whether one particular type of controversy cognizable under the Act could be determined in a court of law:

"In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforceable in the courts should be implied. Unless that test is met the assumption must be that Congress fashioned a remedy available only in other tribunals."

To the same effect, see

General Committee v. Southern Pacific R. Co., 320 U. S. 338;

Switchmen's Union v. Nat. Mediation Board, 320 U. S. 297.

It has been noted that one of the "General Purposes" of the Act, Sec. 2 (5), is to provide for the "prompt and orderly settlement of *all* disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions." (Italics supplied.) It is certain that the Congressional purpose will be seriously impaired if a carrier or union is left free to decide whether it will accept the statutory provisions for "prompt and orderly settlement," or will embark upon an expensive and protracted litigation in the state courts, such as the present five-year proceeding.

The uniform course of decisions in this Court establishes the principle that when Congress "occupies the field" in an area of federal jurisdiction, the authority of the state legislative and judicial bodies is terminated. This well-established doctrine is particularly applicable to the field of labor relations.

The latest expression by this Court on this general subject may be found in *California v. Zook*, 336 U. S. 725. There, the question was as to the right of a State to legislate in a field occupied by Congress. The general test formulated was this:

"But whether Congress has or has not expressed itself, the fundamental inquiry, broadly stated, is the same: does the State action conflict with national policy?"

It seems clear that the same test must be applied when the problem involved is one of possible conflict in the area

of federal and state adjudication. It is self-evident that the exercise of jurisdiction by the state courts in railway labor disputes does in fact conflict with the national policy as stated by Congress, i.e., "to provide for the prompt and orderly settlement of all disputes . . ." (Sec. 2).

Uniformity of interpretation of the language contained in agreements can only be attained by adherence to the Adjustment Board procedure. The factual questions presented are invariably intricate and technical, requiring the consideration of men informed by experience.

An examination of a few of the difficulties encountered in the present case by Court and counsel by reason of the technical jargon employed indicates clearly why Congress decided to entrust such controversies to expert tribunals. (R. 135, 144, 145).

The factors just considered would seem to demonstrate conclusively that concurrent jurisdiction by the courts and the administrative tribunal in cases of this kind, is contrary to the legislative intent as interpreted by this Court in a variety of similar cases. Does the holding of this Court in *Moore v. Illinois Central R. Co.*, supra, require a different result in the present case?

The courts below apparently reached that conclusion in holding that the rule stated in the *Moore* case was intended by this Court ~~to apply to all types of controversy~~ which might arise under agreements promulgated under the Railway Labor Act. However, later decisions of this Court, in the same field, have made it abundantly clear that the doctrine of the *Moore* case will be limited to the particular type of controversy there considered, viz., a "common law action to recover wages," as it was described in *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U. S. 342.

No case in this Court can be cited in which a carrier or labor organization was permitted to seek a judicial inter-

pretation of a collective bargaining agreement before submission to the Adjustment Board.

On the contrary, in other cases involving controversies under the Railway Labor Act, this Court has regularly remanded the litigants to the administrative remedies under the Act, either as a matter of law, or in the exercise of sound judicial discretion. The most informative cases in this respect are *Gen. Comm. of Adj. v. Missouri, Kansas, Texas R. Co.*, 320 U.S. 323, and *Order of Railway Conductors v. Pitney*, 326 U. S. 561.

The limited effect of the *Moore* case is made very clear by the decision in the *Pitney* case. There, the plaintiff organizations representing certain employees of a bankrupt railroad, sought to have the Federal District Court issue an injunction restraining an alleged violation of the Railway Labor Act. In order to determine the merits of the controversy, it was necessary for the Court to interpret the collective bargaining agreements between the carrier and two organizations as here. The District Court interpreted the agreements, and dismissed the petition on the merits. On appeal, the Circuit Court held that the petition should have been dismissed on jurisdictional grounds, because the remedies of the Railway Labor Act for the settlement of such disputes were exclusive. This Court upheld the decision of the Circuit Court with respect to denying jurisdiction to the District Court to pass upon the question presented.

Since the decision in the case just cited, the federal courts have regularly refused jurisdiction of such disputes, either as a matter of law or in the exercise of judicial discretion and have remitted the parties to the appropriate administrative procedure. See for example, *Order of Railroad Telegraphers v. New Orleans, Texas and Mexico R. Co.*, 156 F. 2d 1; cert. den. 239 U. S. 758, *Brotherhood of Railroad Trainmen v. Texas & Pacific Ry. Co.*, 159 F. (2d), 822; cert.

den. 332 U. S. 760; *Missouri, Kansas and Texas R. R. Co. v. Randolph*, 164 F. (2d) 4, cert. den. 334 U. S. 818; *Hampton, et al v. Thompson*, 171 F. (2d) 535, 538.

II

The Availability of a Superior Remedy Specifically Enacted by Plenary Legislative Authority for the Purpose of Exercising Jurisdiction Over This Precise Type of Controversy Should Have Led to the Dismissal of the Present Complaint. The New York Courts Erred in Failing to Follow the Rule of Policy on This Subject Established by This Court in the Pitney Case.

Much that has been said in the argument under Point I is relevant to this point. The jurisdiction of the Adjustment Board is patent beyond dispute; in fact, the present controversy is almost a prototype of the kind of case that is heard by the several Divisions every day. This tribunal is recognized by carriers and labor unions alike as the appropriate forum for the prompt and expert settlement of such controversies. The respondent itself is no stranger to this tribunal. The Twelfth annual report of the National Mediation Board shows that the respondent carrier was a party to seventeen cases before the Adjustment Board in the year 1945-46; the Thirteenth annual report shows that it participated in twenty-six such cases in 1946-47; and the Fourteenth annual report shows it appearing in seventeen cases in 1947-48. The same reports show that respondent has appeared in eighty-three separate cases before the Third Division of this Board during the past seven years. If respondent has now decided that the administrative remedy is slow, uncertain and unreliable, its discovery of these defects, which it now urges with such vigor, has been belated.

The respondent and the courts below made much of the supposed speed with which matters of this kind could be disposed of in the state courts as compared with the Railroad Adjustment Board. A glance at the history of this "hoary litigation" (Cf. *The Order of Railroad Telegraphers v. Railway Express Agency*, 321 U. S. 342) is the best answer to this contention. The case was started in 1944, after five years of protracted delay on the part of the respondent in making the necessary determination which would have permitted the union to invoke the administrative remedy.

On the other hand, the normal procedure before the Third Division of the Adjustment Board is most expeditious. (See Fourteenth Annual Report of the National Mediation Board). It is abundantly clear that if respondent had complied with its statutory duty by deciding the union's grievances promptly, the present controversy would have been promptly and long since finally determined by the Adjustment Board.

On the other hand, the Adjustment Board is made up exclusively of practical railroad men drawn equally from management and labor. These men are informed by experience and have a complete familiarity with such controversies, which they hear every day, and they need no glossary to guide them through the mazes of railroad shorthand. In such a case, a pinch of experience is worth a pound of logic.

The considerations of public policy which found expression in the congressional creation of these highly specialized tribunals under the Railway Labor Act have been well summarized by the Circuit Court of Appeals for the District of Columbia (per Rutledge, J.) in *Washington Terminal Com-*

pány v. Boswell, 124 F. (2d) 235, 241, affirmed by a divided Court, 319 U. S. 732, 733.² We quote from that opinion:

"The whole adjustment procedure up to the point of award, findings and order by the Board, appears to be constructed upon the idea that it is not the business of the lawyers, but is the business of railroad men, workers and managers alike. That does not make their findings and decisions less probative; rather it should make them more so. They know the language, functions and purposes of railroads and of their collective agreements. This judgment is informed by experience in negotiating and administering these contracts. Because of this they, perhaps better than lawyers, are qualified to interpret and apply them."

When these considerations are applied to the case at bar, the result seems clear. The reasons which have impelled the federal courts, without exception, to refuse jurisdiction in this type of controversy, do not disappear by reason of respondent's ingenuity in filing in the state courts.

An essential condition precedent to the granting of a declaratory judgment is lacking when the statutory remedy available is not only adequate but clearly superior. In such a case, the parties will be required to exhaust the administrative procedure before seeking relief in the courts.

Macauley v. Waterman S. S. Corp., 327 U. S. 540, 545.

Especially must this be true when the alternative remedy available is a statutory procedure specifically designed for the exact type of controversy by the paramount legislative authority in the field.

In holding otherwise, the Court of Appeals adopted a rule of judicial policy contrary to that enunciated by this

² It will be noted that this Court upon the argument in the *Boswell* case requested the Solicitor General to file a brief on the jurisdiction of the courts "either before or after submission of the dispute to the Board"—a clear indication that this Court did not consider this question foreclosed by the *Moore* case. (63 Sup. Ct. Rep. 198)

Court in a field where the decisions of this tribunal have universally been considered to be controlling:

"But on a question of statutory construction of the act of Congress which has been determined by the Supreme Court of the United States, subsequently arising in this court, we should feel bound to adopt and follow the construction of the tribunal on the principle of comity, although in a case where the ultimate jurisdiction is vested in this court. This principle is especially important to be observed in such a case, in view of the relation between the Federal and state courts, not exercising, in all cases, a co-ordinate jurisdiction, but engaged in the administration of justice to a great extent between persons who are citizens both of a state and of the United States. The decisions of the tribunals of a state as to the true construction of the statutes of its own sovereignty are followed by the Federal courts, and it would be most unseemly and produce great confusion if state courts should refuse to adopt the construction of the Supreme Court of the United States, of Federal statutes." *York v. Conde*, 147 N. Y. 486, writ of error dismissed 168 U. S. 642.

Conclusion

The petition for Certiorari should be granted in order that this Court may review the judgment of the Court of Appeals, State of New York, in this case.

Respectfully submitted,

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Petitioner.*

APPENDIX

The pertinent provisions of the Railway Labor Act (48 Stat. 1185, 45 U. S. C., Sec. 151, *et seq.*) are as follows:

GENERAL PURPOSES

"Sec. 2. The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; * * * (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation of application of agreements covering rates of pay, rules, or working conditions.

GENERAL DUTIES

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

* * * * *

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or car-

riers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: PROVIDED, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: AND PROVIDED FURTHER, That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

.

NATIONAL BOARD OF ADJUSTMENT—GRIEVANCES—
INTERPRETATION OF AGREEMENTS

Sec. 3. First. There is hereby established a Board, to be known as the 'National Railroad Adjustment Board', the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees or through an officer or officers designated for that purpose by such board, trustee or trustees or receiver or receivers, shall prescribe the rules under which its rep-

representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

(c) The national labor organizations, as defined in paragraph, (a) of this section acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after the passage of this Act, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, which ever he is to represent.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

Third Division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

.

(i) THE DISPUTES between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, SHALL BE HANDLED IN THE USUAL MANNER UP TO AND INCLUDING THE CHIEF OPERATING OFFICER OF THE CARRIER DESIGNATED TO HANDLE SUCH DISPUTES; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes. (*Italics supplied.*)

.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall ~~forthwith agree upon~~ and select a neutral person, to be known as 'referee', to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a

member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

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(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

(q) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

.

NATIONAL MEDIATION BOARD

Sec. 4. First. The Board of Mediation is hereby abolished, effective thirty days from the approval of this Act and the members, secretary, officers, assistants, employees, and agents thereof, in office upon the date of the approval of this Act, shall continue to function and receive their salaries for a period of thirty days from such date in the same manner as though this Act had not been passed. There is hereby established, as an independent agency in the executive branch of the Government, a board to be known as the 'National Mediation Board', to be composed of three members appointed by the President, by and with the advice and consent of the Senate, not more than two of whom shall be of the same political party. * * * No person in the employment of or who is pecuniarily or otherwise interested in any organization of employees or any carrier shall enter upon the duties of or continue to be a member of the Board.

.

FUNCTIONS OF MEDIATION BOARD

Sec. 5. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such con-

troversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

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Second. In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this Act. EITHER PARTY TO THE SAID AGREEMENT, OR BOTH, MAY APPLY TO THE MEDIATION BOARD FOR AN INTERPRETATION OF THE MEANING OR APPLICATION OF SUCH AGREEMENT. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days. (*Italics supplied.*)

Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without re-

quest for or proffer of the services of the Mediation Board.

• • • • •
NEW YORK STATE RULES OF CIVIL PRACTICE

Rule 212. *Jurisdiction discretionary.* If, in the opinion of the court, the parties should be left to relief by existing forms of actions, or for other reasons, it may decline to pronounce a declaratory judgment, stating the grounds on which its discretion is so exercised.

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OCTOBER TERM, 1949

No. 391

MARION J. SLOCUM, as General Chairman, Lackawanna
Division No. 30 of The Order of Railroad Telegraphers,
Petitioner,

vs.

THE DELAWARE, LACKAWANNA & WESTERN
RAILROAD COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF FOR THE PETITIONER

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Supreme Court of the United States

OCTOBER TERM, 1949.

No. 391

MARION J. SLOCUM, as General Chairman, Lackawanna
Division No. 30 of The Order of Railroad Telegraphers,
Petitioner,

vs.

THE DELAWARE, LACKAWANNA & WESTERN
RAILROAD COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE PETITIONER

Opinions Below

The Opinion of Justice Personius of the New York State Supreme Court denying petitioner's motion to remove the action to the United States District Court is reported at 183 Misc. 454, 50 N. Y. S. 2d 313.

The opinion of United States District Judge Knight remanding the case to the Supreme Court of Chemung County, New York, is reported in 56 Fed. Supp. 634. Petitioner's motion to dismiss made in the New York State Su-

preme Court after remand, under Rules 112 and 143 of the New York Rules of Civil Practice, was denied by Supreme Court Justice Newman. His opinion is printed at (R. 22).

The opinion of the Appellate Division of the Supreme Court, Third Department, affirming the order of the Supreme Court, denying the motion to dismiss, is reported in 269 App. Div. 467, 57 N. Y. S. 2d 65 (R. 25).

The *Per Curiam* opinion of the same court on affirmance of the judgment, following the trial, is reported in 274 App. Div. 950, 83 N. Y. S. 2d 513 (R. 282).

The opinion of the Court of Appeals of New York (R. 356) is reported in 299 N. Y. 496, 87 N. E. (2d) 532.

Jurisdiction

The judgment of the Court of Appeals of the State of New York was entered on July 19, 1949 (R. 351). The jurisdiction of this Court rests on Section 1257 (3) of Title 28 of the United States Code.

Statement of the Case

The petitioner in this case challenges a judgment of the Court of Appeals of the State of New York which affirmed actions of the lower courts of that state in entertaining jurisdiction to determine a controversy concerning the interpretation of collective bargaining agreements entered into pursuant to the provisions of the Railway Labor Act (48 Stat. 1185; 45 U. S. C. A. 151 *et seq.*). One of these agreements was between the respondent and The Order of Railroad Telegraphers, a railroad labor organization national in scope, of which the petitioner is an official; the other agreement was between the respondent and The

Brotherhood of Railway and Steamship Clerks, a similar national railroad labor organization, the General Chairman of which was named as a co-defendant with petitioner, but who is no longer a party to this action. Since the principal questions on this appeal relate to the jurisdiction of state courts in the field of railway labor relations, the facts of the particular dispute which gave rise to the present litigation will be summarized only to the extent necessary to show the exact nature of the controversy presented to the trial court, and its relation to the important questions of constitutional law and public policy here presented.

On February 26, 1944, The Delaware, Lackawanna & Western R. R. Co., respondent, filed a complaint in the Supreme Court of New York, Chemung County, demanding a declaratory judgment declaring the rights, obligations, liabilities and legal relations of respondent and The Order of Railroad Telegraphers and the Brotherhood of Railway and Steamship Clerks, arising under agreements between respondent and each of said organizations of employees (R. 4).

It appeared that respondent entered into an agreement with the telegraphers January 1, 1929 (R. 284), which was amended May 1, 1940 (R. 329). An agreement was entered into by respondent with the clerks on October 1, 1934, (R. 302) and subsequently amended January 1, 1939 (R. 313).

The controversy involved a claim by petitioner's organization (Telegraphers) that certain work being performed by crew-callers in respondent's Elmira Yard fell within the scope rule of the telegraphers' agreement. On the other hand, the clerks' organization maintained that all work performed by said crew-callers came within the scope rule of their agreement. On May 1, 1938, respondent abolished

the positions of three towermen at its "LV" Tower and of three operators at its Elmira Yard "MS" (R. 9). Thereupon, by agreement with the telegraphers, respondent created three positions of "operator towermen" at "LV" Tower and transferred the work of three towermen and three operators, all of which came within the scope rule of the telegraphers' agreement dated January 1, 1929, to the three operator towermen located in the "LV" Tower and to the three clerk-operators located in the Elmira passenger station (R. 6, 9). The latter three positions of clerk-operators were listed in, and the work performed by the three operator-towermen came within, the scope rule of the said telegraphers' agreement (R. 9). At the time the work of said operators was removed from the Elmira Yard to the tower, some of the work attached to the positions in the Yard still remained to be performed. This remaining work was assigned by the respondent to employee members of the clerks' organization (R. 9).

Respondent further alleged that a dispute existed between the telegraphers and the clerks as to whether the work performed by crew-callers came within the scope rule of the respective agreements (R. 11).

Respondent asked for an interpretation of all four agreements with the two organizations involved; asserted that its interpretation favored the clerks' organization; and requested the court to declare that all work performed by crew-callers came within the scope rule of the clerks' agreement (R. 14).

Respondent further alleged upon information and belief, that if it recognized the claim of the telegraphers it would be subjected to a claim by the clerks who would present the same under the Railway Labor Act to the Third Division of the National Railroad Adjustment Board (R. 15). Cor-

responding allegations were made as to assertion and recognition of a claim by the clerks in which event the telegraphers would present their claim under the Railway Labor Act to the Third Division of the Adjustment Board (R. 12). The basis upon which the respondent relied to sustain the jurisdiction of the court to grant declaratory relief is set forth in Paragraph 30 of the complaint, wherein respondent alleged it had no adequate remedy at law, and no adequate remedy before the National Railroad Adjustment Board, since there was no procedure whereby respondent could bring said claims jointly before the Third Division or any Division of the Adjustment Board for determination, or whereby respondent could make both organizations parties thereto, so that both organizations would be bound by any decision of said Third Division (R. 13). Respondent further alleged that the matter in dispute had not been submitted to any court, board or tribunal for determination (R. 13).

The action was commenced in the Supreme Court of the State of New York by the service of the summons and verified complaint on the petitioner on March 3, 1944, and on the general chairman of the clerks on March 10, 1944. Petitioner immediately filed a petition in the State Supreme Court for removal of the action to the United States District Court at Buffalo. Such application was denied by Justice Personius.

Thereafter, a petition and bond for removal was submitted to the Honorable John Knight, United States District Judge for the Western District of New York, and approved by him, and a certified copy of the record was filed in the District Court on April 12, 1944. Thereupon, the petitioner moved in said court to dismiss the action for lack of jurisdiction.

Respondent appearing specially on April 25, 1944, made a cross motion to remand the case to the state court. The petitioner's motion to dismiss was denied and the respondent's motion to remand to the state court was granted.

After remand, petitioner filed a verified answer and moved to dismiss in the state court. The grounds of the motion to dismiss on argument were the same as those set forth in the motion to dismiss filed in the United States District Court. The motion was denied by Supreme Court Justice Newman, on the authority of *Moore v. Illinois Central R. R.*, 312 U. S. 630 (R. 23). The Appellate Division of the Supreme Court, in affirming the denial of the motion to dismiss, relied upon the same case, stating:

"A real controversy exists under the contracts. The Courts of this state furnish a more convenient forum for the trial of the issues than the statutory Board which functions in a distant state." (R. 26.)

Petitioner in his answer alleged he was progressing his claims against respondent pursuant to the provisions of the Railway Labor Act, as amended, and that the grievances had been processed, pursuant to the Act, to the chief operating officer of the respondent; that the chief operating officer had not made a determination of said grievances pursuant to the said Act, and that it was the intention of The Order of Railroad Telegraphers to progress said grievance pursuant to the Railway Labor Act to a conclusion (R. 19). Petitioner denied the allegations in paragraph 30 of the complaint with respect to the claimed inadequacy of the remedy before the National Railroad Adjustment Board. The verified answer filed by the clerks denied the same allegations (R. 16). Both answers demanded dismissal of respondent's complaint (R. 18, 21).

At the opening of the trial, counsel for petitioner and counsel for the clerks joined in a renewed attack on the

jurisdiction of the court preliminary to the trial on the merits (R. 34, 36). Again these motions were denied.

The lengthy record was devoted principally to conflicting testimony with respect to the duties performed by the crew-clerks, and the historical, customary and long established practice of telegraphers in performing such work as compared to clerks. This testimony is stated briefly for the light which it sheds upon the precise nature of the jurisdictional controversy involving the two organizations before the trial court which, as will be demonstrated later, was not really justiciable at all.

It appeared that the jobs of three operators in the respondent's yard office at Elmira, were abolished on May 1, 1938. These jobs had always been held by telegraphers (R. 44, 50). The duties of the operators were then distributed among clerk operators at Elmira ticket office, and the operator-levermen at Elmira tower; and the remaining communication work assigned to the crew-clerks (not covered by the schedule), who remained in the yard office formerly occupied by the operators (R. 73, 157).

The controversy centered about the work newly assigned the crew-clerks, who were and still are members of clerks' organization. The respondent's testimony disclosed the existence of a jurisdictional dispute between the defendant organizations (R. 67, 93), and that changes made in the agreements between the organizations of employees and the respondent were accomplished arbitrarily and without notice by respondent to either of the organizations, as required by Sec. 6 of the Railway Labor Act (R. 94).

While the action was in form an action to interpret four written agreements it developed upon the trial that no decision could be made on any such basis. The scope rule of none of the agreements defined the duties of the posi-

tions listed therein, and no court could possibly have interpreted these agreements to determine the controversy. It thus appeared that the true nature of the controversy was that of a jurisdictional dispute, *i. e.*, a dispute between two labor organizations as to the representation of particular employees performing a variety of duties of a mixed nature. It was clearly demonstrated that substantial clerical duties were performed by these employees (R. 92, 106). On the other hand, it was shown by an overwhelming volume of testimony that the telegraphers had historically represented all employees engaged in any form of communications work, even though the same employees performed incidental clerical work (R. 44), and it was not seriously disputed that a large portion of the crew-clerks' work was in this field (R. 72 *et seq.*). The trial court's decision was apparently based upon the assumption advanced by the respondent in its complaint, that the work done by the crew-clerks could not fall within the scope rules of both agreements. Clearly this was a false assumption, as it was demonstrated that the crew-clerks, in fact, performed duties which had been previously performed by different employees, both telegraphers and clerks, whose positions were specifically listed in both agreements. In view of the undisputed testimony on this subject, the only rational explanation of the trial justice's decision is that he determined that the crew-clerks did more clerical work than communications work, and that therefore they should be deemed to be within the clerks' agreement. In other words, the decision did not interpret either agreement because there was no basis for making any legal interpretation.

It further appeared that the telegraphers' grievance had been regularly presented to the proper official of the carrier in at least *four* separate written communications, and the

statutory procedure of the Railway Labor Act was thereby instituted (R. 261, 264-8). The respondent neglected and refused to pass upon the claim, despite its repeated presentation by letter and in conference, and no decision denying the claim was ever made by respondent prior to the institution of this litigation.

No proof, documentary or otherwise, was submitted by respondent in support of its conclusions alleged in paragraph 30 of the complaint that it had no adequate remedy before the National Railroad Adjustment Board.

Petitioner and the clerks renewed their motions to dismiss the complaint at the conclusion of respondent's case in chief again stressing the primary jurisdiction doctrine (R. 107, 115). The motions were denied (R. 122).

Following petitioner's testimony, the motions to dismiss were renewed and dismissal of the complaint requested on the grounds previously argued to the effect that jurisdiction to decide the dispute over the interpretation of the agreements was vested in the National Railroad Adjustment Board and that the evidence disclosed the existence of a jurisdictional dispute not justiciable by the court (R. 230).

The clerks introduced no testimony and the matter was taken under advisement by the court on August 9, 1945, (R. 230).

The trial court held on March 7th, 1946, that a *bona fide* dispute existed between the respondent and the two organizations of employees as to whether the work of crew-callers came within the terms of the respective agreements; that the respondent had no adequate remedy at law; and that the respondent was entitled to judgment construing the various agreements. The construction adopted was in favor of the

position of the clerks' organization. Findings 28, 41, 43, 44 (R. 238, 240, 241). Conclusions of Law 2, 9, 11, 12 (R. 243, 244, 245); Judgment, Pars. 2, 9, 11, 12 (R. 248-250).

The decision of the Supreme Court was affirmed by the Appellate Division, Third Department, in a brief *Per-Curiam* opinion, citing its previous ruling on the motion to dismiss and *Moore v. Illinois Central R. R. Co.*, 312 U. S. 630, (R. 282). The court, in the same opinion, stated that this Court in *Order of Railway Conductors v. Pitney*, 326 U. S. 561, "did not overrule the holding of the Moore case" (R. 283).

Pursuant to New York practice, application was then made to the Appellate Division for leave to appeal to the Court of Appeals. This application was denied.

Petitioner then applied to the Court of Appeals for leave, and permission was granted by that court (R. 283). The Court of Appeals affirmed, by a divided court, Desmond and Fuld, JJ. dissenting (R. 356). The court, following a synoptic discussion of the "General Purposes" of the Railway Labor Act, held that "until the *Moore* case is limited to its facts or overruled, we should follow it, as have the Courts below." In referring to the *Pitney* case, the Court of Appeals said:

"That case not only does not support appellant's position, but on the question of the jurisdiction of the courts, it is clearly to the contrary" (R. 361).

In the course of the opinion, the Court of Appeals further stated:

"Rather this is a case where there is at most concurrent jurisdiction by the Adjustment Board and the State Supreme Court, over the parties and the subject matter, and before any proceeding has been instituted before the Board, the plaintiff has seen fit to ask merely

for an interpretation of the agreements between the parties in an action for a declaratory judgment in the Supreme Court" (R. 364, 365).

Finally, the court quoted with approval the reasons advanced by the trial justice and the Appellate Division in denying petitioner's motion to dismiss:

"The controversy arose out of work performed at Elmira and there seems to be no reason why the plaintiff should be compelled to go to the National Railroad Adjustment Board at Chicago, with the attendant delays, especially in view of the fact that it is questionable if the relief there afforded is adequate. The condition of the court calendar here, where the controversy arose, is such that the case can be disposed of expeditiously and at the convenience of the respective parties, affording full, adequate and prompt relief.

"The Appellate Division in affirming that order likewise said (269 App. Div. 469): 'The courts of this State furnish a more convenient forum for the trial of the issues than the statutory board which functions in a distant state. Under such conditions, plaintiff should not be denied the right to litigate here and obtain a judgment declaratory of its obligations under the contracts' " (R. 365, 366).

Judge Desmond, dissenting, was of the opinion that the basic question in the *Pitney* case was exactly the question in the present case, and that this Court in the *Pitney* case had held that under the Railway Labor Act the determinations sought by respondent here are not the business of the courts but of the Railroad Adjustment Board. The dissenting opinion concluded by holding the *Moore* case inapplicable, stating that if this Court in the *Pitney* case had determined that the *Pitney* situation was the same as the *Moore* situation, except for the element of bankruptcy in the *Pitney* case, this Court would have said so and not let the *Moore* case go unmentioned in the *Pitney* opinion (R. 366, 369).

Specification of Errors

Petitioner specifies the following errors in the judgment to be reviewed:

1. The Court of Appeals erred in affirming the judgment of the courts below, since the Supreme Court of the State of New York lacked jurisdiction to enter a declaratory judgment interpreting collective bargaining agreements promulgated under the Railway Labor Act, before the carrier had exhausted the administrative remedies provided in the Act.

2. The Court of Appeals erred in failing to follow the public policy of the Railway Labor Act as determined by this Court in *Order of Railway Conductors v. Pitney*, 326 U. S. 561, which required the state courts to refuse jurisdiction in the present case.

3. The Court of Appeals erred in its judgment that there is concurrent jurisdiction in the National Railroad Adjustment Board and the State Supreme Court over the parties and the subject matter.

4. The Court of Appeals erred in its judgment that the courts of New York afforded a more convenient forum for the trial of the issues than the National Railroad Adjustment Board in Chicago.

5. The Court of Appeals erred in its judgment that the procedure under the Railway Labor Act was inadequate to bind all of the parties.

Statutes Involved

The pertinent provisions of the Railway Labor Act (48 Stat. 1185, 45 U. S. C. Sec. 151 *et seq.*) are set forth in an appendix to this brief.

The applicable provisions of the New York Civil Practice Act and the Rules of Civil Practice are as follows:

C. P. A. "§ 473. Declaratory judgments. The supreme court shall have power in any action or proceeding to declare rights and other legal relations on request for a such declaration whether or not further relief is or could be claimed, and such declaration shall have the force of a final judgment. Such provisions shall be made by rules as may be necessary and proper to carry into effect the provisions of this section."

Rule 212 of the Rules of Civil Practice:

"Jurisdiction discretionary. If, in the opinion of the court, the parties should be left to relief by existing forms of actions, or for other reasons, it may decline to pronounce a declaratory judgment stating the grounds on which its discretion is so exercised."

Summary of the Argument

Petitioner's argument may be summarized as follows:

1. The Railway Labor Act was intended by Congress to set up an exclusive procedure for the prompt determination of disputes between carriers and organizations of employees growing out of the interpretation of collective bargaining agreements. Since the paramount authority of the federal government, acting under the commerce clause of the constitution, has preempted this field, the jurisdiction of the state courts in such matters has been terminated.

2. State courts are bound by the interpretation of a federal statute by the Supreme Court of the United States. This Court has held in the *Pitney* case that the public policy embodied in the Railway Labor Act prevents the exercise of jurisdiction by the courts to decide disputes and interpret collective bargaining agreements, under the

circumstances here presented. That public policy is inherent in the Act as construed by this Court, and the Court of Appeals was not at liberty to hold otherwise.

3. The administrative remedy, provided by federal statute, was specifically designed to resolve disputes such as the one here presented before an expert tribunal, particularly versed in railroad labor matters. The statutory procedure had already been set in motion by the petitioner before the present litigation was instituted by respondent, and a full and adequate remedy was therefore available to the parties. Under these circumstances, it was a mistake of law for the state courts to deny the motions to dismiss for want of jurisdiction.

Argument

I

The Railway Labor Act precludes the exercise of jurisdiction by state courts to interpret collective bargaining agreements in disputes between carriers and labor organizations.

The validity of the Railway Labor Act, which established tribunals and procedures for the prompt determination of labor disputes involving interstate rail carriers, is beyond dispute. This Court has repeatedly upheld these provisions under the constitutional power of Congress to regulate interstate commerce.

Texas & N. O. R. Co. v. Brotherhood of Railway Clerks, 281 U. S. 548;.

Virginian Ry. Co. v. System Federation, 300 U. S. 515, 553.

One of the main purposes of the 1934 amendments to the Act of 1926 was to provide a more effective process of settlement. *Elgin J. & E. R. Co. v. Burley*, 325 U. S. 711, 725, 726. This appears clearly both from the structure and language of the amendments and from a consideration of the background of their enactment.

The 1934 amendments, incorporated in the present Act were designed to provide a general and inclusive plan for the settlement of *all* railway labor disputes, to refer to the specific language of Sec. 2, "General Purposes." The aim was not to dispense with voluntary agreements and settlements between disputing parties, but rather to provide agencies and tribunals for resolving disputes which could not be otherwise determined without prolonged industrial strife. A most important objective of the 1934 amendments was that of attaining uniformity in the interpretation and administration of the law with respect to collective bargaining agreements and the respective rights of carriers and employees.¹ This uniformity was intended to extend to the promulgation of agreements, the creation of tribunals for interpretation of such agreements, and the procedure for the resolution of controversies arising under them. Separate tribunals were therefore provided which, it was expected, would be peculiarly fitted to deal with the specific controversies committed to their respective jurisdictions. The plan of the Act in this respect is as follows:

The National Railroad Adjustment Board has general jurisdiction over disputes growing out of grievances, or out of interpretation or application of agreements concerning rates of pay, rules, or working conditions. The Board consists of thirty-six members, eighteen selected by the carriers

¹ Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L. J. 567 (1937).

and eighteen selected by labor organizations of the employees, national in scope, organized in accordance with the provisions of the Act. The Board is divided into four Divisions, and it is important to note that a single Division, viz., the Third Division, has jurisdiction over both telegraphers and clerical employees (Sec. 3 (h)).

The interpretation of collective bargaining agreements promulgated under the Railway Labor Act by an agency especially competent and specifically designated to deal with this subject provides stability to labor relations. This was a primary objective of Congress in enacting the amendments, Section 153 *et seq.*, to the Railway Labor Act in 1934.

Section 153, First (i), of the Act provides that disputes growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions,

“ * * * shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the dispute may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board
* * * ” (Italics supplied.)

The Act thus specifies a complete procedure for the handling of claims of this type. The first step in the administrative procedure is the referral of the complaint through normal channels to the chief operating officer of the carrier (Sec. 3 (i)), that being the exact procedure initiated by the petitioner before the commencement of the present action (R. 33-4, 261-273). If adjustment is not reached in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board, “with a full statement of the facts and all

supporting data bearing upon the disputes." Awards of the Adjustment Board may be enforced by appropriate action in the United States District Court (Sec. 3 (p)).

The second major tribunal created by the Act is the National Mediation Board (Secs. 4, 6). A principal function of this Board is the mediation, and, if necessary, the determination of representation cases.

It may be pointed out in passing that it is frequently difficult to determine exactly which type of controversy is involved in a particular case, since a single dispute (such as the one here considered) may involve questions of interpretation or application of contracts, as well as questions of policy with respect to representation. This Court has flatly held that the latter questions are not within the jurisdiction of any court. *General Committee, etc. v. M. K. T. R. Co.*, 320 U. S. 323.

Applying the usual rules of interpretation applied to federal legislation under the commerce clause by this Court, it would seem clear that the jurisdiction of both statutory administrative tribunals was intended to be exclusive. The uniform course of decision in this Court establishes the principle that when Congress "occupies the field" in an area of federal jurisdiction, the authority of the state legislative and judicial bodies is terminated. This familiar doctrine is particularly applicable to the field of labor relations.

Bethlehem Steel Co. v. N. Y. State Labor Rel. Bd.,
330 U. S. 767;

LaCrosse Telephone Co. v. Wisconsin Employment Rel. Bd., 336 U. S. 18.

In the *Bethlehem* case, this Court at page 772, said:

"It long has been the rule that exclusion of state action may be implied from the nature of the legislation

and the subject matter although express declaration of such result is wanting.”

The latest expression by this Court on this general subject may be found in *California v. Zook*, 336 U. S. 725. There the question was as to the right of a state to legislate in a field occupied by Congress. The general test formulated was this:

“But whether Congress has or has not expressed itself, the fundamental inquiry, broadly stated, is the same: does the State action conflict with national policy?”

It seems clear that the same test must be applied when the problem involved is one of possible conflict in the area of federal and state adjudication. It is self-evident that the exercise of jurisdiction by the state courts in railway labor disputes does in fact conflict with the national policy as stated by Congress in the “General Purposes” of the Act.

Before proceeding to a discussion of the particular case relied upon by the respondent and by the courts below as establishing a contrary rule (*Moore v. Illinois Central R. Co.*, 312 U. S. 650), we call attention to a few of the factors which seem to indicate that Congress certainly intended the jurisdiction conferred upon these tribunals, to be exclusive in a controversy such as is here considered.

In the first place, the history of the Act, and the purposes expressed in Sec. 2 seem to be conclusive on this subject. As was said by this Court in *General Committee, etc., v. M. K. T. R. Co.*, *supra*, at page 337, in considering whether one particular type of controversy cognizable under the Act could be determined in a court of law:

“In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforceable in the courts should be implied.

Unless that test is met the assumption must be that Congress fashioned a remedy available only in other tribunals."

To the same effect:

General Committee v. Southern Pacific R. Co., 320

U. S. 338;

Switchmen's Union v. National Mediation Board,

320 U. S. 297.

A further reference to the legislative history of the 1934 Act will demonstrate the reasons for this conclusion. At hearings before the House Committee on Interstate and Foreign Commerce on H. R. 6750, 73d Cong. 2d Sess., p. 47, 48, Mr. Joseph B. Eastman, Federal Coordinator of Transportation, advanced the desirability of "a more uniform settlement of these disputes." He stated:

"I also have the feeling that the national board will have a very distinct advantage, because it can establish certain precedents of general application which should furnish a guide for deciding cases locally. As a matter of fact the same rules are now interpreted in many different ways throughout the country, and that is one reason why grievances which arise remain unsettled, because there is disagreement as to what the same language means and a great variety of interpretations. If we had one board, nation-wide, setting precedents in these matters, I think the tendency would be to establish guides which would enable a great many of the issues to be settled at home."

. . .

The same witness further testified:

"Furthermore, I have the feeling that it is very desirable to have a more uniform settlement of these disputes. These matters that we are now dealing with are grievances. They are not the basic rates of pay or the basic working rules and the interpretation of those rules or grievances which men have, and it doesn't seem

to me that it is necessary to have any number of different ways of disposing of those all over the country, and that the national board could soon set certain precedents which would discourage and limit the number of such disputes which would arise, because it would be perfectly clear what the outcome would be if they were referred to the national board."

A reference to some of the practical considerations which must have influenced the passage of this legislation will buttress the view that the remedies provided were intended to be exclusive. Congress knew that uniformity in applying labor agreements was more likely to be achieved if all disputes were to be submitted to a national board rather than to state or federal courts, and the establishment of the Adjustment Board in itself manifests a congressional intention that *all* disputes such as existed between respondent and petitioner, be submitted to it rather than to the courts.

The amendments to the Act created a federal right in petitioner to select the one forum established for the prompt disposition of any dispute over which the Adjustment Board had jurisdiction. The petitioner chose to exercise that right and the present dispute was handled under the mandatory provisions of Section 153(i) "• • • up to and including the chief operating officer of the carrier designated to handle such disputes • • •"

There would be little incentive to progress a case under these provisions should the opinion of the Court of Appeals be allowed to stand. The chances of settlement on the property would diminish and disputes would remain in a stagnant condition; eventually industrial peace and uninterrupted transportation service would be threatened.

Should the decision of the court below stand, it will offer the respondent and other carriers the opportunity to by-

pass the Adjustment Board and seek interpretations of collective bargaining agreements between a carrier and the following overlapping organizations of employees—the Engineers and the Firemen and Enginemen; the Trainmen and the Conductors; the Trainmen and the Switchmen; the Telegraphers and the Clerks; the Telegraphers and the Dispatchers, and between numerous shop-craft organizations of employees. Such action would result in compulsory acceptance of judicial decisions, and would effect a change in the Act not intended by the carriers and the organizations of employees who jointly appealed to Congress in behalf of the principles of the 1934 amendments. The fact that no reference was made to judicial remedies by the representatives of either the carriers or the organizations of employees at the hearings on the proposed amendments, suggests that the courts were not intended to play an important role in resolving this type of dispute. It follows that both sides engaging in the legislative discussion recognized that some other method of settling such disputes was essential.

It is also certain that uniformity of interpretation of the language contained in these agreements can only be attained by adherence to the Adjustment Board procedure. The factual questions presented are invariably intricate and technical, requiring the consideration of men informed by experience.

The precedents and factors just considered would seem to demonstrate conclusively that concurrent jurisdiction by the courts and the administrative tribunals in cases of this kind is contrary to the legislative intent as interpreted by this Court in a variety of similar cases. Does the holding of this Court in *Moore v. Illinois Central R. Co.*, 312 U. S. 630, require a different result in the present case?

The courts below apparently reached that conclusion in holding that the rule stated in the *Moore* case was intended by this Court to apply to all types of controversies which might arise under agreements promulgated under the Railway Labor Act. However, later decisions of this Court, in the same field, have made it abundantly clear that the doctrine of the *Moore* case will be limited to the particular type of controversy there considered, viz., a "common law action to recover wages," as it was described in *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U. S. 342.

No case in this Court can be cited in which either a carrier or labor organization has been permitted to seek a judicial interpretation of a collective bargaining agreement before exhausting the administrative processes of the Railway Labor Act.

On the contrary, in other cases involving controversies under the Railway Labor Act, this Court has regularly remanded the litigants to the administrative remedies under the Act, either as a matter of law, or in the exercise of sound judicial discretion. The most informative cases in this respect are *Gen. Comm. of Adj. v. Missouri, Kansas, Texas R. Co.*, 320 U. S. 323, and *Order of Railway Conductors v. Pitney*, 326 U. S. 561.

The *M. K. T.* case involved a factual situation strikingly similar to the case at bar. The dispute there was as to the proper representation of employees of the carrier who worked sometimes as firemen and sometimes as engineers. The engineers brought an action in the United States District Court seeking a declaratory judgment that an agreement entered into by the carrier with the firemen was in violation of the Railway Labor Act and that they should be declared the sole representative of all locomotive engineers

with the exclusive right to bargain for them pursuant to the collective bargaining agreement that they had entered into.

This Court held that the provisions of the Railway Labor Act conferred exclusive jurisdiction of that type of controversy upon the tribunals set up by the Act, in that case the National Mediation Board. We quote from the opinion at pages 327, 328:

"But we do not intimate an opinion concerning them. For we are of the view that the District Court was without power to resolve the controversy."

"It is our view that the issues tendered by the present litigation are not justiciable—that is to say that Congress by this Act has foreclosed resort to the courts for enforcement of the claims asserted by the parties."

• • •

At page 336:

"It seems to us plain that when Congress came to the question of these jurisdictional disputes, it chose not to leave their solution to the courts. . . . However wide may be the range of jurisdictional disputes embraced within § 2, Ninth, Congress did not select the courts to resolve them. To the contrary, it fashioned an administrative remedy and left that group of disputes to the National Mediation Board. If the present dispute falls within § 2, Ninth, the administrative remedy is exclusive. If a narrower view of § 2, Ninth, is taken, it is difficult to believe that Congress saved some jurisdictional disputes for the Mediation Board and sent the parties into the federal courts to resolve the others. Rather the conclusion is irresistible that Congress carved out of the field of conciliation, mediation and arbitration only the select list of problems which it was ready to place in the adjudicatory channel. All else it left to those voluntary processes whose use Congress had long encouraged to protect these arteries of interstate commerce from industrial strife. The concept of mediation is the antithesis of justiciability."

While the case just cited involved a controversy which was held to be within the jurisdiction of the National Mediation Board rather than the Railroad Adjustment Board, the reasoning of the Court applies with like force to any dispute between a carrier and a railroad labor organization arising out of a collective bargaining agreement and also having to do with a question of representation, commonly called a jurisdictional dispute. In point of fact, the range of possible controversies arising under the Railway Labor Act may be thought of as a spectrum running from the common law damage action brought by an individual employee as in the *Moore* case, to the most intricate jurisdictional dispute involving primarily questions of history and policy such, for example, as in *General Committee of Adjustment v. Southern Pacific*, 320 U. S. 338.

The *M. K. T.* case and the present case fall midway in the spectrum. Since the substance of the controversy is almost identical in the two cases, it is submitted that the present case, like *M. K. T.*, is one over which the courts are denied jurisdiction.

The nature of the testimony produced upon the trial buttresses this view. When the carrier's case was commenced, it became immediately apparent that this was no action to obtain a legal interpretation of a written contract, since the contract involved was silent on the precise subject of controversy. In such circumstances, history, past practices and long established policy rather than the letter of the written contract must decide the controversy. But precisely this type of controversy has been committed by Congress to expert tribunals especially created for this purpose, and the *M. K. T.* case makes it clear that this Court will enforce the Congressional intent.

The limited effect of the *Moore* case is made very clear by the decision in the *Pitney* case. There, the plaintiff organization representing certain employees of a bankrupt railroad, sought to have the Federal District Court issue an injunction restraining an alleged violation of the Railway Labor Act. In order to determine the merits of the controversy, it was necessary for the court to interpret the collective bargaining agreements between the carrier and two organizations, as here. The district court interpreted the agreements, and dismissed the petition on the merits. On appeal, the circuit court held that the petition should have been dismissed on jurisdictional grounds, because the remedies of the Railway Labor Act for the settlement of such disputes were exclusive. This Court upheld the decision of the circuit court with respect to denying jurisdiction to the district court to pass upon the question presented. This Court's opinion, 326 U. S. 561, 566, 567, that the district court should not have interpreted the contracts for purposes of finally adjudicating the dispute is applicable and controlling here:

"* * * We have seen that in order to reach a final decision on that question the court first had to interpret the terms of O. R. C.'s collective bargaining agreements. The record shows, however, that interpretation of these contracts involves more than the mere construction of a 'document' in terms of the ordinary meaning of words and their position. See *Drown Lumber Co. v. L. & N. R. Co.*, 299 U. S. 393, 396, 57 S. Ct. 265, 266, 81 L. Ed. 301; *Great Northern Ry. Co. v. Merchants Elevator Co.*, 259 U. S. 285, 291, 42 S. Ct. 477, 479, 66 L. Ed. 943. For O. R. C.'s agreements with the railroad must be read in the light of others between the railroad and B. R. T. And since all parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom that too must be taken into account and properly understood. The factual question is intricate and technical.

An agency especially competent and specifically designated to deal with it has been created by Congress. Under these circumstances the court should exercise equitable discretion to give that agency the first opportunity to pass on the issue."

It is apparent from the two cases just cited that this Court intends to limit the doctrine of the *Moore* case to its precise facts, namely, a common-law action to recover wages brought by an employee against a carrier where the questions involved are primarily legal in nature and require no particularly expert knowledge or background. So far as counsel are aware, this Court has never permitted an action in any court of law between a carrier and a railroad labor organization for the interpretation of a collective bargaining agreement, or for the resolution of a jurisdictional dispute or other controversy arising in connection with such agreements.

Since the decisions in the cases just cited, the federal courts have regularly refused jurisdiction of such disputes as a matter of law, and have remitted the parties to the appropriate administrative procedure. See for example: *Missouri, Kansas, Texas R. Co. v. Randolph*, 164 F. 2d 4, cert. den. 334 U. S. 818; *The Order of Railroad Telegraphers v. New Orleans, Texas & Mexico Ry. Co.*, 156 F. 2d 1, cert. den. 329 U. S. 758; *Brotherhood of Railroad Trainmen v. Texas and Pacific Ry. Co.*, 159 F. 2d 822, cert. den. 332 U. S. 760; *Illinois Central R. Co. v. Brotherhood of Railroad Trainmen, et al.*, 83 F. Supp. 930; and the unreported decisions of *Atlantic Coast Line R. R. Co. v. Brotherhood of Railroad Trainmen*, U. S. D. C., So. Dist. of Florida, March 30, 1948, and *Seaboard Airline R. R. Co. v. Brotherhood of Railroad Trainmen, et al.*, U. S. D. C., No. Dist. of Alabama, March 25, 1949.

Nowhere in the Railway Labor Act or its amendments is any jurisdiction conferred on any court involving any matter which may be the subject of action under the Act *except* jurisdiction on "the District Court of the United States" to hear an application for enforcement of an award, Sec. 3 (p.) and jurisdiction to impeach an award rendered by a board of arbitration under Sec. 9 of the Act. When Congress provided for judicial action in these particular cases, and in Sec. 2 of the same Act omitted any such provisions as to further jurisdiction, concurrent or otherwise, by any court, "it drew a plain line of distinction." *Switchmen's Union of North America v. National Mediation Board, et al.*, 320 U. S. 297, 306.

II

State courts are bound to follow the public policy of a Federal statute as interpreted by this Court.

The point to be discussed is summarized in the following excerpts from Judge Desmond's dissenting opinion in the Court of Appeals (R. 366, 367):

"The basic question in the Pitney case was exactly the question here, and the Supreme Court said in so many words that the United States District Court should not have interpreted the labor agreements for the purposes of adjudicating the dispute between the unions and the railroad, but should have left all that to the Board. The Supreme Court pointed out, 326 U. S. 566, that in order to decide that basic question, the court would have to interpret the collective bargaining agreements in dispute, and that such interpretation involved more than the mere construction of a document but had to be made in the light of other agreements and in the light of usage, practice and custom.

. . .

"In the case we have before us, the trial court granted no injunction or other relief—its judgment is nothing more or less than a declaration as to the meaning of these collective bargaining agreements and their application to the facts. In other words, the trial court did, here, exactly what the Supreme Court said it was improper for any court to do: Take unto itself a function reserved by Congress to the Adjustment Board. It does not seem to me to make any great difference whether we label this 'want of jurisdiction' or 'abuse of discretion.' Whatever be the appropriate label, this declaratory judgment cannot, under the rule of the *Pitney* case, stand, and we are just as much bound to reverse for this kind of abuse of discretion (see *Colson v. Pelgram*, 259 N. Y., 370, 377) as for an absolute lack of jurisdiction."

Judge Learned Hand in *Amey v. Colebrooke Guaranty Savings Bank*, 92 F. 2d 62, has put the matter this way:

"Courts do not always exert themselves to the full, or direct parties to all that they can effectively compel, and such forbearance is sometimes called lack of 'jurisdiction.'"

It may be also noted that in failing to follow the exact precedent of the *Pitney* case, the Court of Appeals departed from its own long-established rule of judicial policy:

"But on a question of statutory construction of the act of Congress which has been determined by the Supreme Court of the United States, subsequently arising in this court, we should feel bound to adopt and follow the construction of the tribunal on the principle of comity, although in a case where the ultimate jurisdiction is vested in this court. This principle is especially important to be observed in such a case, in view of the relation between the Federal and state courts, not exercising, in all cases, a co-ordinate jurisdiction, but engaged in the administration of justice to a great extent between persons who are citizens both of a state and of the United States. The decisions of the tribunals of a state as to the true construction of the statutes of its own sovereignty are followed by the Federal courts."

and it would be most unseemly and produce great confusion if state courts should refuse to adopt the construction of the Supreme Court of the United States, of Federal statutes."

Yorke v. Conde, 147 N. Y. 486; writ of error dismissed, 168 U. S. 642.

So here, this Court has construed a federal statute. It has found, inherent in the statute, a legislative intent to confer exclusive primary jurisdiction on a newly created administrative tribunal in exactly the type of case here presented. In the face of that ruling, the New York Court of Appeals has held that no such policy inheres in the statute and that it is free to determine the question of jurisdiction in the exercise of its own judicial discretion. Such a holding involves a novel and far-reaching modification of the traditional concept of the relationship between the federal and state judicial systems.

We may now consider whether any special circumstances, revealed in the pleadings or on the trial, justified the Court of Appeals in approving retention of jurisdiction of this particular case.

(1) Adequacy of the administrative remedy.

The present controversy is almost a prototype of the kind of case that is heard by the Railroad Adjustment Board every day. This tribunal is recognized by carriers prompt and expert settlement of such controversies. The and labor unions alike as the appropriate forum for the respondent itself is no stranger to this tribunal. The Twelfth annual report of the National Mediation Board shows that the Delaware, Lackawanna and Western Railroad Company was a party to seventeen cases before the Adjustment Board in the year 1945-46; the Thirteenth annual report shows that it participated in twenty-six such

cases in 1946-47; the Fourteenth annual report shows it appearing in seventeen cases in 1947-48; and the Fifteenth annual report shows it appearing in thirty-six cases in 1948-1949. The same reports show that the respondent has appeared in ninety-six separate cases before the Third Division of this Board during the past seven years. If this carrier has now decided that the administrative remedy is slow, uncertain and unreliable, or that the distance between Elmira and Chicago is prohibitive (R. 365), its discovery of these defects, which it now urges with such vigor, has been belated.

The respondent, and the courts below, made much of the supposed speed with which matters of this kind could be disposed of in the state courts as compared with the Railroad Adjustment Board. A glance at the history of this "hoary litigation" (Cf. *The Order of Railroad Telegraphers v. Railway Express Agency*, 321 U. S. 342) is the best answer to this contention. The case was started in 1944, after five years of protracted delay on the part of the carrier in making the necessary determination which would have permitted petitioner's organization to invoke the administrative remedy, and another six years have now passed without an end to the litigation.

On the other hand, the normal procedure before the Third Division of the National Railroad Adjustment Board is most expeditious (See Fifteenth Annual Report of the National Mediation Board). It is abundantly clear that if the carrier had complied with its statutory duty by deciding the grievances promptly, the present controversy would have been promptly and long since finally determined by the Third Division of the Adjustment Board.

As to the comparative advantages of the two procedures, the record speaks for itself on this question. The testimony

is replete with technical railroad jargon, some of which was apparently unintelligible even to the experienced trial counsel (See for example R. 95, 102-104). Without reflecting on the learned trial court, it may be assumed that he shared some of the same confusion.

On the other hand, the Railroad Adjustment Board is made up exclusively of practical railroad men drawn equally from management and labor. These men are informed by experience and have a complete familiarity with such controversies, which they hear every day. They need no glossary to guide them through the mazes of railroad shorthand. In such a case, a pinch of experience is worth a pound of logic.

The considerations of public policy which found expression in the congressional creation of these highly specialized tribunals under the Railway Labor Act have been well summarized by the Circuit Court of Appeals for the District of Columbia (per Rutledge, J.) in *Washington Terminal Company v. Boswell*, 124 F. 2d 235, 241, aff'd by a divided Court, 319 U. S. 732. We quote from Judge Rutledge's opinion below:

"The whole adjustment procedure up to the point of award, findings and order by the Board, appears to be constructed upon the idea that it is not the business of lawyers, but is the business of railroad men, workers and managers alike. That does not make their findings and decisions less probative; rather it should make them more so. They know the language, functions and purposes of railroads and of their collective agreements. Their judgment is informed by experience in negotiating and administering these contracts. Because of this they, perhaps better than lawyers, are qualified to interpret and apply them."

Similar considerations have impelled this Court to establish a comparable rule of judicial forbearance, both

state and federal, in matters arising under the Interstate Commerce Act.

Pennsylvania R. R. Co. v. Sonman Shaft Coal Co.,
242 U. S. 120, 123-124.

Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204
U. S. 426, 446-477.

Pennsylvania R. R. Co. v. Puritan Coal Co., 237
U. S. 121, 129.

*Great Northern Railway Co. v. Merchants Elevator
Co.*, 259 U. S. 285.

Loomis v. Lehigh Valley R. R. Co., 240 U. S. 43.

Armour & Co. v. Alton R. Co., 312 U. S. 195.

See also:

Macauley v. Waterman S. S. Corp., 327 U. S. 540,
545.

When these considerations are applied to the case at bar, the conclusion seems clear. The reasons which have impelled the federal courts, without exception, to refuse jurisdiction in this type of controversy, do not disappear by reason of the carrier's ingenuity in filing in the state courts.

A fortiori is this true when the alternative remedy available is a statutory procedure specifically designed for the exact type of controversy by the paramount legislative authority in the field.

(2) Respondent's claimed right to interpleader.

The Court of Appeals held in effect that respondent could maintain this action in the nature of interpleader, the implicit assumption being that it was entitled as a matter of law to a favorable interpretation of its contract with one or the other of the two unions. The court thought that "there is at least some doubt that the procedure under the

Railway Labor Act is adequate to bind all three parties to the action." Its opinion on this matter does not, of course, conclude this Court. A federal right, substantive or procedural, cannot be destroyed by its denial in a state court, even though the denial take the form of a substitute procedure: "This federal right cannot be defeated by the forms of local practice." *Brown v. Western Ry. of Alabama*, 70 S. Ct. 105.

Passing to the substance, respondent's claim has no basis in law. It is obviously not true that the carrier is entitled to a favorable declaration against one of the two labor organizations as a matter of course. On the contrary, the record makes it abundantly clear that the activities performed by the crew-clerks include those primarily performed by telegraphers and secondarily those performed by clerks. Without arguing the merits of the controversy at length, it seems evident that a proper disposition of the controversy would have been to find that each contract covered a particular phase of the work of the crew-clerks.

Even if it be assumed, however, that the carrier was entitled to be relieved of obligation under one or the other contract, this would not justify the ousting of the statutory tribunal, which clearly has jurisdiction over the entire case and all of the parties. In order to reach any such conclusion, it would be necessary to make still a further assumption, namely, that the Railroad Adjustment Board would reach erroneous and inconsistent decisions if the cases were separately presented.

We do not suppose that this Court will give serious consideration to any such supposition. Even its speculative value is eliminated, moreover, by the provisions for complete judicial review accorded by Sec. 3 (p) of the Act.

In enforcement suits, the Board's awards are only *prima facie* evidence of the facts stated, and this has the effect of merely shifting the burden of proof. The remedy thus established by Congress was intended to be legally adequate to protect carriers as well as employees in all situations, either before or after determination by the Adjustment Board.

The procedure is identical with the enforcement of reparation orders of the Interstate Commerce Commission. Section 3 (p) of the Railway Labor Act had its analogue in Sec. 16(2) of Title 49 U. S. C. *Meeker & Co. v. Lehigh Valley R. Co.*, 236 U. S. 412; *Baldwin v. Scott County Milling Co.*, 307 U. S. 478, 482.

(3) Nature of the Present Controversy.

We now invite the attention of the Court to certain other features of the present case which make its submission to the statutory tribunal particularly imperative.

In the first place, as we have pointed out, the controversy was not really justiciable, because the issue basically was not the interpretation of an agreement but the settlement of a jurisdictional dispute. Resort was had by both parties to the history and practice of the railroad and the labor organizations, a field of experience in which the Railroad Adjustment Board has certainly a unique competence. The result was an erroneous decision that the crew-clerks were really doing work which was primarily clerical rather than relating to communications.

Second, it may be pointed out that the decision will be wholly ineffective as a permanent resolution of the jurisdictional dispute which constitutes the real controversy. As has been shown, exactly the same facts which gave rise to the present controversy might be presented tomorrow in

a slightly different form of proceeding before the National Mediation Board in a representation case. Since the jurisdiction of that Board has been expressly held by this Court to be exclusive (*M. K. T. case, supra*), it is certain that the decision which has been rendered here would have no binding effect of any kind in such a case.

An interesting case which indicates the complications which may arise from the assertion of jurisdiction by different tribunals is *The Order of Railroad Telegraphers vs. Railway Express Agency, Inc.*, 321 U. S. 342, 348. In that opinion, Justice Jackson points out that state statutes of limitation are not applicable in the administrative proceedings set up by the Railway Labor Act. If state courts are regularly to entertain jurisdiction in such cases, it is clear, therefore, that conflicting decisions will inevitably be made, and the Congressional purpose of attaining uniform interpretations of collective bargaining agreements promulgated under the Railway Labor Act, will be entirely frustrated.

The New York courts, in common with courts of other jurisdictions, have heretofore consistently refused to entertain an action for a declaratory judgment when a proper proceeding for the determination of the same controversy has already been instituted:

"When, however, another action by the same parties in which all issues could be determined, is actually pending at the time of the commencement of an action for a declaratory judgment, the court abuses its discretion when it entertains jurisdiction."

Woolard v. Schaffer Stores Co., 272 N. Y. 313.

The rule just stated poses another and insuperable obstacle to the affirmance of this judgment. The Railway Labor Act sets up specific steps in the administrative procedure which is provided for the settlement of contro-

versies such as this. The first step is the presentation of the dispute to the "chief operating officer of the carrier designated to handle such disputes" (Sec. 3 (i)). This step was taken in the present case some five years before the present action was commenced, and during the intervening period the appellant made repeated and unsuccessful efforts to pursue the administrative remedy which had been thus instituted (R. 261-273). The presentation of the claim to the carrier, exactly as it was done in the present case, was a necessary first step in the specified procedure, and the proceeding was therefore pending in the same way that it would have been had the case been in its second phase before the Railroad Adjustment Board. Under these circumstances, it was clearly an abuse of discretion for the state court to usurp jurisdiction of the pending controversy.

Conclusion

From what has been said, we think it must be evident that the issues on this appeal have a significance far beyond the question of whether the crew-clerks in the Elmira Yards perform telegraphic or clerical work. If the present judgment is affirmed, the Congressional intent, the "General Purposes" of the Act, and the "General Duties" imposed on carriers and employees alike, all designed to provide prompt and orderly settlement of railway labor controversies, will become a mere will-of-the-wisp. The choice of tribunal will then be within the discretion, not of Congress or even of the courts, but of the parties alone. Instead of a uniform body of principles and precedents formulated and administered by a single expert tribunal, we may expect varying decisions and inconsistent administration throughout the forty-eight states. The Railway

Labor Act was not devised to empower courts to exercise concurrent jurisdiction with the several administrative boards it created. A contrary interpretation may well mean the reappearance of wide spread industrial strife, which has historically accompanied extension of judicial intervention in labor matters.

This Court has found in the Act a wise rule of policy which remands carriers and labor organizations alike to the statutory procedures for the settlement of railroad labor controversies. No reason appears why this salutary rule, clearly stated in the *Pitney* case, should not be applied to proceedings in state and federal courts alike. Since the *Pitney* rule has its origin in a federal statute, it is submitted that no grounds exist for holding it inoperative in a state tribunal.

Respectfully submitted,

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APPENDIX

The pertinent provisions of the Railway Labor Act (48 Stat. 1185, 45 U. S. C., Sec. 151, *et seq.*) are as follows:

GENERAL PURPOSES

“Sec. 2. The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; * * * (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

GENERAL DUTIES

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or car-

riers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: PROVIDED, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: AND PROVIDED FURTHER, That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

• • •

NATIONAL RAILROAD ADJUSTMENT BOARD.

Sec. 3. First. There is hereby established a Board, to be known as the 'National Railroad Adjustment Board', the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act.

• • •

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

• • •

Third Division: To have jurisdiction over disputes involving station, tower, and telegraph employees.

train dispatchers; maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the Chief Operating Officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as 'referee', to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of

arbitrators and shall fix and pay the compensation of such referees.

. . .

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be *prima facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

(q) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

. . .

NATIONAL MEDIATION BOARD

Sec. 4. First. The Board of Mediation is hereby abolished, effective thirty days from the approval of this Act and the members, secretary, officers, assistants,

employees, and agents thereof, in office upon the date of the approval of this Act, shall continue to function and receive their salaries for a period of thirty days from such date in the same manner as though this Act had not been passed. There is hereby established, as an independent agency in the executive branch of the Government, a board to be known as the 'National Mediation Board', to be composed of three members appointed by the President, by and with the advice and consent of the Senate, not more than two of whom shall be of the same political party. * * * No person in the employment of or who is pecuniarily or otherwise interested in any organization of employees or any carrier shall enter upon the duties of or continue to be a member of the Board.

* * *

FUNCTIONS OF MEDIATION BOARD

-Sec. 5. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

* * *

Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where

such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

Supreme Court of the United States

October Term, 1949.

No 391

MARION J. SLOCUM, as General Chairman, Lackawanna Division
No. 30 of The Order of Railroad Telegraphers,
Petitioner,

vs.

**THE DELAWARE, LACKAWANNA & WESTERN
RAILROAD COMPANY,**
Respondent.

**Respondent's Brief in Opposition to Petitioner's
Application for a Writ of Certiorari.**

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Supreme Court of the United States

OCTOBER TERM, 1949

No. 391

MARION J. SLOCUM, as General Chairman, Lackawanna
Division No. 30 of The Order of Railroad Telegraphers,
Petitioner,

U.S.
THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COM-
PANY,
Defendant.

Respondent's Brief in Opposition to Petitioner's Application for Writ of Certiorari.

Statement.

The petitioner has filed with this Court a petition for writ of certiorari to the Court of Appeals of New York alleging that the jurisdiction of this Court is found in 28 U.S.C.A., §1257 (3). The validity of no statute either of the United States or of the State of New York has been questioned and presumably the petitioner is claiming some title, right, privilege or immunity under the statutes of the United States.

Petitioner in his petition has failed to specify, "the stage in the proceedings in the Court of first instance and in the Appellate Court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by

the Court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the Court's charge and exception thereto, assignment of error) as will support the assertion that the rulings of the Court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this Court. The provisions of this paragraph, with appropriate record page references, must be complied with when review of a State Court judgment is sought by petition for writ of certiorari" (Rule 12, Revised Rules of the Supreme Court of the United States).

Question Presented.

This action was instituted in the Supreme Court of the State of New York for the construction of certain contracts between respondent and petitioner and between respondent and Louis J. Carlo as General Chairman of System Board of Adjustment, Delaware, Lackawanna and Western Railroad, of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, hereinafter referred to as the "clerks." As indicated in the petition no appeal was taken by the clerks from the judgment of the Trial Court and they are not a party to this proceeding. The action "does not arise under any law regulating commerce," does not involve a dispute concerning "rates of pay, rules or working conditions" of the employees involved and does not involve "the validity, construction, enforcement or effect of the Railway Labor Act or any federal statute" (*Del. L. & W. R. Co. v. Slocum, et al.*, 56 F. Supp. 634, 636; 183 Misc. 454, 456; 50 N. Y. Supp. [2d] 313).

History of the Litigation.

The action was commenced in the Supreme Court of the State of New York by the service of the summons and verified complaint on the petitioner on March 3, 1944, and on the general chairman of the clerks on March 10, 1944. On March 23, 1944, the petitioner filed a petition and bond for removal of the action to the United States District Court for the Western District of New York. At the same time petitioner applied to the State Supreme Court for an order removing the action to said United States District Court. Such application was denied, Mr. Justice Personius writing an opinion which is reported at 183 Misc. 454, 50 N. Y. Supp. (2d) 313.

Thereafter the bond was submitted to the Honorable John Knight, United States District Judge for the Western District of New York, and approved by him and a certified copy of the record was filed in the District Court on April 12, 1944. On April 18, 1944, the petitioner moved in said Court to dismiss the action for lack of jurisdiction and the respondent on April 25, 1944, made a cross motion to remand the case to the State Court. The petitioner's motion to dismiss was denied and the respondent's motion to remand to the State Court was granted. Judge Knight wrote an opinion which is reported at 56 Fed. Supp. 634.

The clerks served an answer on May 4, 1944, and the petitioner served his answer on August 2, 1944. On January 29, 1945, the petitioner served a notice of motion for dismissal of the complaint under Rules 112 and 113 of the Rules of Civil Practice, returnable at a Trial and Special Term of the Supreme Court, Chemung County, on February 5, 1945. The motion was denied by Mr. Justice Newman in an unreported opinion which is printed in the record at folios 100-109, pp. 34-37.

The petitioner appealed from the order denying his motion and the order was unanimously affirmed by the Appellate Division of the Supreme Court in an opinion written by Presiding Justice Hill and reported in 269 App. Div. 467, 57 N. Y. Supp. (2d) 65.

The action was tried before the Hon. Bertram L. Newman on August 6, 1945, and the written opinion thereon, dated January 9, 1946 and not reported, is printed in the record following page 386.

The formal decision and the judgment were entered on March 7, 1946, and the defendant Slocum appealed to the Appellate Division of the Supreme Court from the judgment. The *per curiam* opinion on unanimous affirmance of the judgment is reported at 274 App. Div. 950, 83 N. Y. Supp. (2d) 513.

Petitioner's motion for leave to appeal to the Court of Appeals was granted by that Court on March 3, 1949. The judgment was affirmed by the Court of Appeals in an opinion written by Judge Conway and reported in 299 N. Y. 496, 87 N. E. (2d) 532.

The rights and liabilities of all the parties to this action have been declared and the controversy has been finally settled. The judgment is amply supported by the facts developed on the trial and the petitioner does not claim in his petition that the judgment of the Trial Court is not correct. The Trial Court found as findings of fact "that this action does not grow out of any dispute concerning rates of pay, rules or working conditions" and "that this action does not involve the validity, construction, enforcement or effect of any statute" (fols. 991-992, p. 331).

In the Appellate Division of the Supreme Court, which Court had power to review the facts and the weight of the evidence, the petitioner did not raise the question that the judgment was not amply supported by the facts or

that the findings of the Trial Court were not amply supported by the evidence.

In the Court of Appeals the only contention raised by the petitioner which could be used to invoke the jurisdiction of this Court under 28 U.S.C.A., §1257 (3) was the contention that the National Railroad Adjustment Board had *exclusive* jurisdiction under the Railway Labor Act to determine this controversy (299 N. Y. 499) (fols. 1515-1516, pp. 505-506). The Court of Appeals rejected such contention pointing out that the language of the applicable section of the Railway Labor Act (45 U.S.C.A., §153 Subd. First [i]), with respect to the submission of disputes to the Railroad Adjustment Board is "may be referred" which is clearly not mandatory (299 N. Y. 496, 502) (fol. 1531, p. 511). The Court of Appeals followed the decision of this Court in *Moore v. Illinois Cent. R. Co.*, 312 U. S. 630, 635-636, where it was held:

"It is to be noted that the section pointed out, §153 (i) as amended in 1934, provides no more than that disputes 'may be referred * * * to the * * * Adjustment Board * * *'. It is significant that the comparable section of the 1926 Railway Labor Act (44 Stat. 577, 578), had, before the 1934 amendment, provided that upon failure of the parties to reach an adjustment a 'dispute shall be referred to the designated Adjustment Board by the parties, or by either party * * *'. Section 3 (c). This difference in language, substituting 'may' for 'shall', was not we think, an indication of a change in policy, but was instead a clarification of the law's original purpose. For neither the original 1926 Act, nor the Act as amended in 1934, indicates that the machinery provided for settling disputes was based on a philosophy of legal compulsion. On the contrary, the legislative history of the Railway Labor Act shows a consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature."

Statutes Involved.

It is the contention of the respondent that the Railway Labor Act is not involved in this litigation under this Court's decision in *Moore v. Illinois Cent. R. Co.*, 312 U. S. 630, and the plain wording of the statute above referred to and such has been the view of the United States District Court and the various State Courts heretofore considering this controversy.

It is likewise the contention of the respondent and the view of said Courts that there was no federal question involved. The remittitur from the Court of Appeals fails to state that any federal question was presented or necessarily passed on by that Court (pp. 495-497).

POINT I.

In view of the decision of this Court in *Moore v. Illinois Cent. R. Co.*, 312 U. S. 630, the petitioner has raised no question sufficiently substantial to support his petition for writ of certiorari.

The very question which petitioner here seeks to raise was decided by this Court on March 31, 1941. In *Moore v. Illinois Cent. R. Co.*, 312 U. S. 630, it was squarely held that the procedure before the National Railroad Adjustment Board was not an exclusive remedy and that a party was not compelled to present its claim to such Board, but had the choice of resorting to a Court of competent jurisdiction in the first instance. It was held also therein that the party need not seek an adjustment of the controversy as provided in the Railway Labor Act as a prerequisite to the bringing of an action in the State Court. The decision in the *Moore* case has never been overruled and has been followed in many state and federal cases.

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In the case of *Washington Terminal Co. v. Boswell*, 124 Fed. (2d) 235, affirmed 319 U. S. 732, Associate Justice Rutledge writing for the United States Court of Appeals for the District of Columbia stated at page 238:

"The decision" (*Moore v. Illinois Cent. R. Co.*, 312 U. S. 630) "establishes that in such circumstances the Act has neither excluded the general jurisdiction of the Courts nor made exhaustion of the administrative remedy prerequisite to its exercise, for decision of controversies which might be determined by the statutory method. At the threshold of controversy accordingly, the disputants have alternate routes which they may follow. One is entirely judicial without regard to the Railway Labor Act. The other is administrative and judicial, according to its terms."

and at page 244:

"The *Moore* decision holds that Congress has not compelled disputants to go before the Board."

and again at page 249:

"The foregoing considerations are reinforced by the fact that the carrier under the decision in *Moore v. Illinois Central R. R.*, *supra*, can bring its suit on the contract, independently of the statute, prior to the time when the dispute is submitted to the Board. Until then, at least, it has its election to pursue the exclusively judicial remedy or to follow the administrative and judicial one provided by the Railway Labor Act."

It will be noted that in the *Washington Terminal Co. v. Boswell* case, the action was for a declaratory judgment by the employer and it was not held that the form of action was not proper or that such action could not be brought by any party to the dispute. The ground for dismissal was that the dispute had actually been submitted to and decided by the Railroad Adjustment Board.

The wording of the statute in respect to the referring of disputes to the National Railroad Adjustment Board is "may be referred" and as above stated, it is in no sense compulsory that the dispute be submitted to that tribunal for decision.

As pointed out in the opinions which have been written in the present case, the respondent has sought no rights under the Railway Labor Act, the action being one of construction or interpretation of the contracts between the parties (183 Misc. 454; 56 Fed. Supp. 634, 637; 269 App. Div. 467; 274 App. Div. 950; 299 N. Y. 496, 507) (fols. 1554-1555, pp. 518-519).

Before the Railway Labor Act of 1934, was enacted, the State Courts took jurisdiction of controversies involving the construction of working agreements such as those involved in this case (*Piercy v. Louisville & Nashville Ry. Co.*, 198 Ky. 477, 248 S. W. 1042; *McGregor v. Louisville & Nashville Ry. Co.*, 244 Ky. 635, 51 S. W. (2d) 953; *Panhandle and Santa Fe Ry. Co. v. Wilson* (Texas), 55 S. W. (2d) 216; *Long v. Baltimore & Ohio R. R. Co.*, 155 Md. 265, 141 Atl. 504; *Gregg v. Starks*, 189 Ky. 32, 224 S. W. 459; *Rentschler v. Missouri Pacific Ry. Co.*, 126 Nebraska 493, 253 N. W. 694; *McCoy v. St. Joseph Belt Ry. Co.*, 229 Mo. App. 506, 77 S. W. (2d) 175; *George T. Ross Lodge v. Brotherhood of Railroad Trainmen*, 191 Minn. 373, 254 N. W. 590; *Gary v. Central of Georgia Ry. Co.*, 37 Ga. App. 744, 141 S. E. 819). There has been no ousting of the jurisdiction of the State Courts by the enactment of the Railway Labor Act (*Moore v. Illinois Central* [*supra*]). The following are some of the cases adjudicated in the State Courts since enactment of the Act: *Brotherhood of Locomotive Engineers v. Mills*, 43 Ariz. 379, 31 Pac. (2d) 971; *Florestano v. Northern Pacific Ry. Co.*, 198 Minn. 203, 269 N. W. 407; *Moore v. Illinois Central*, 180 Miss. 276, 176 So. 593; *Swilley v. G.*

H. & S. A. Ry. Co. (Texas), 96 S. W. (2d) 105; *Franklin v. Pennsylvania-Reading S. S. Lines*, 122 N. J. Eq. 205, 193 Atl. 712; *McCrory v. Kurn* (Mo.), 101 S. W. (2d) 114; *Lyons v. St. Joseph Belt Ry. Co.* (Mo.), 84 S. W. (2d) 933; *Evans v. Louisville & N. R. Co.*, 191 Ga. 395, 12 S. E. (2d) 611; *Wooldridge v. Denver & R. G. W. R. Co.* (Col.), 191 Pac. (2d) 882; *Southern Ry. Co. v. Order of Ry. Conductors of America* (So. Car.), 41 S. E. (2d) 774.

Federal Courts within the State of New York have recognized the jurisdiction of the State Courts as proper tribunals to decide questions arising out of working agreements such as here presented (*Swartz v. So. Buffalo Ry. Co.*, 44 Fed. Supp. 447; *McDermott v. New York Central R. Co.*, 32 Fed. Supp. 873).

The construction of the working agreements is frequently by declaratory judgment (*Piercy v. Louisville & Nashville Ry. Co.*, 198 Ky. 477, 248 S. W. 1042; *Burton v. Oregon-Washington R. & Nav. Co.*, 148 Ore. 648, 38 Pac. [2d] 72; *Louisville & Nashville R. Co. v. Bryant*, 263 Ky. 578, 92 S. W. [2d] 749; *Wooldridge v. Denver & R. G. W. R. Co.* [Col.], 191 Pac. [2d] 882; *Southern Ry. Co. v. Order of Ry. Conductors of America* [So. Car.], 41 S. E. [2d] 774).

The petitioner advanced in the state courts the claim that the controversy here is not justiciable, relying on the decisions of *General Committee of Adjustment v. M. K. T. R. R. Co.*, 320 U. S. 323, and *General Committee of Adjustment v. Southern Pacific R. Co.*, 320 U. S. 338. Those cases are cited here in support of the petition. These are purely representation cases and have no application to this case which involves the question of interpretation of existing contracts. The *Southern Pacific* and *M. K. T.* cases presented the question of which union

was the proper bargaining representative for the engineers in handling controversies with the carrier's representatives. In the *Southern Pacific* case, the engineers claimed to be the exclusive representatives of all engineers whether belonging to their union or the Firemen's Union in handling their individual grievances. It sought to have the collective bargaining agreement between the carrier and the firemen, which provided that an engineer had the right to be represented by the committee of his own organization in the handling of his grievances, declared invalid under the Railway Labor Act. In the *M. K. T.* case, the engineers sought a declaratory judgment that they be declared the sole representatives of the locomotive engineers with exclusive right to bargain for them and that the mediation agreement which had been made between the firemen and the carrier be declared invalid as in violation of the Railway Labor Act. The engineers claimed that the carriers had no right under the Act to negotiate with the firemen on the subject of emergency engineers. This Court in each case held that such representation problems did not present justiciable controversies but should be resolved by the mediation procedure provided by the Act.

There is no representation dispute in the case at bar. It has been pleaded in the complaint and admitted in the answers that the petitioning Union is the sole bargaining agent for the telegraphers (pp. 8, 28), and the other defendant Union is the sole bargaining agent for the clerks (pp. 10-11, 25). The only issue involved in this case is which contract covers the positions held by the crew clerks. While the Courts will not determine who is the proper bargaining agent, the Courts will interpret the contracts duly and regularly entered into between the carrier and such sole bargaining agents.

The foregoing distinction was clearly pointed out in *Elgin, Joliet & Eastern Ry. Co. v. Burley*, 325 U. S. 711. The Court of Appeals in this case, quoting from the *Burley* case, said (299 N. Y. 496, 501-502) (pp. 509-511, fols. 1527-1531):

"Beyond the initial stage of negotiations and conference the act provides for different methods of settlement for the two classes of disputes. As pointed out in *Elgin, Joliet & Eastern Ry. Co. v. Burley* (325 U. S. 711, 723), the first type 'relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.' Concerning that class of disputes the act provides first for mediation before the National Mediation Board, if that fails, then voluntary arbitration; and if that fails, conciliation by presidential intervention (U. S. Code, tit. 45, §§155, 157, 160; see *Burley* case, *supra*, p. 725).

"The second class of disputes 'contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one' (*Burley* case, *supra*, p. 723). All parties and the Courts below agree that the instant case is within the second classification, and that the course prescribed by the act for the settlement of this type of dispute is submission to the Railroad Adjustment Board. . . . It will be noted that the wording of the statute with respect to the submission of disputes to the Board is 'may be referred' which is clearly not mandatory."

The petitioner relies also on the case of *Order of Railway Conductors v. Pitney*, 326 U. S. 561. In that case a dispute arose as to whether the yard conductors represented by the Trainmen's Union or the road conductors represented by the Conductors' Union should operate certain trains within the yard. The District Court had to act in a dual capacity as the railroad was in bankruptcy in that court. It had to instruct its trustees how to proceed and in so doing was obliged to interpret the Union agreements. The conductors claimed that the work in question could not be taken from them and given to the trainmen without negotiating the work out of their contract and asked the Court to enjoin such transfer of work unless such contract was changed by the method prescribed by the Railway Labor Act. They sought an injunction restraining the trustees from transferring the work until negotiated out of their contract by the process of mediation. The District Court had to determine whether there was any clear violation of a right given by Congress and in determining such question would have to interpret the conductors' agreement to determine whether it gave the conductors the work. If it did not, no negotiation of a new agreement was necessary. This Court held that the District Court properly proceeded to interpret the agreements insofar as instructing its trustees was concerned but it should have refrained in its discretion from interpreting the contracts as a basis for injunctive relief to give the parties the opportunity to have the contracts interpreted by the National Railroad Adjustment Board.

The fact that the Court had to interpret the contracts in two capacities, in the first of which it was identified with one of the parties to the dispute, made it proper and desirable that it should pass the question to another tribunal for determination as between the parties.

The *Pitney* case does not hold that the matter was not justiciable as it was suggested that it be given to the Adjustment Board which equally with the Courts under the *Moore* decision may interpret the contracts. It does not deny to the Courts the right to interpret the contracts but states that under the circumstances of that case as a matter of discretion the court of equity should stay its hand. Furthermore, the case was essentially one in reference to alteration of an existing contract, a case on the mediation rather than the adjustment side of the statute, the suit being one for an injunction to stay what was claimed to be a clear violation of a right given by the statute, i. e., that the existing agreement be changed only in the manner prescribed by the Act.

There is nothing in the *Pitney* case in conflict with the decision in the case at bar where the Court merely has exercised its jurisdiction to interpret existing contracts. No question of negotiating contracts is involved and no question of acting in a dual capacity.

In referring to the *Pitney* case the Court in *Southern Ry. Co. v. Order of Ry. Conductors of America* (So. Car.), 41 S. E. (2d) 774, stated at page 778:

"It might further be noted that the Supreme Court in the *Pitney* case did not hold that the Federal Court did not have jurisdiction. It merely held that in consideration of the complicated features of the case, the Court should retain jurisdiction to stay action on the prayer for injunction in order to permit the parties to first have the two contracts interpreted by the administrative procedure provided in the Railway Labor Act. Nowhere in the opinion of the Court do we find any reference made to the case of *Moore v. Illinois Cent. R. Co.*, *supra*. If it had been the intention of the Court to overrule the *Moore* case which was decided in 1941, we think this would have been done in specific language."

In the case just cited, the United States District Court remanded the cause to the state court. In the opinion reported at 63 Fed. Supp. 306, the Court said at page 308:

"And so it is quite clear that there is concurrent jurisdiction of the subject matter of this suit either by the Adjustment Board or a court of competent jurisdiction. The parties by agreement may use either method of adjudication, or either party may institute an action in a court or before the Board. I am of the opinion that if the matter is taken first before a Court it will retain jurisdiction and carry the case through to an adjudication. If, however, the Board has taken jurisdiction the Court will not interfere. These views seem amply sustained by numerous decisions of our Courts."

In remanding the present cause to the state court, the District Court Judge used similar language (56 Fed. Supp. 634, 637):

"As hereinbefore pointed out, the instant action is simply one to declare the meaning of certain contracts. However worthwhile procedure under the Railway Labor Act may be, no law makes it compulsory and no law denies the jurisdiction of the State Court."

It has been held that the Railway Labor Act does not preclude state action in regulation of working conditions. *Terminal R. Assn. v. Brotherhood of R. Trainmen*, 318 U. S. 1. Likewise, there is nothing in the Act to indicate it furnishes an exclusive remedy for controversies heretofore justiciable in the courts. In creating the Adjustment Board, the plain intent of Congress was to provide an additional tribunal which might be used at the option of the parties. No railroad employee having a claim against his employer on contract should be obliged

to go to the Board to have his contractual rights and obligations determined when local courts, federal or state, provide a more convenient forum.

Any delay in progressing this controversy through the state court is largely attributable to the petitioner's efforts to remove a non-removable case and to have the state court hold that it lacked or should decline on discretionary grounds to exercise jurisdiction.

No new or novel question is presented on this application for certiorari in respect to the application of the Railway Labor Act, nor is there any contention that there is a conflict of decisions in the state or federal courts. The jurisdiction of the state court has been upheld on seven occasions in the course of this litigation and by each of the Courts which examined it. The question sought to be raised is so insubstantial in the light of the clear decisions of this Court, it is respectfully submitted the petition should be denied.

POINT II.

The petition should be denied.

Respectfully submitted,

**ROWLAND L. DAVIS, Jr.,
HALSEY SAYLES,**

**Attorneys for The Delaware, Lackawanna
& Western Railroad Company, Respondent.**

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Supreme Court of the United States

October Term, 1949.

No. 391.

MARION J. SLOCUM, as General Chairman, Lackawanna
Division No. 30 of The Order of Railroad Telegraphers,
Petitioner,

vs.

THE DELAWARE, LACKAWANNA & WESTERN
RAILROAD COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF
THE STATE OF NEW YORK.

BRIEF OF RESPONDENT.

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Supreme Court of the United States

OCTOBER TERM, 1949

No. 391

MARION J. SLOCUM, as General Chairman, Lackawanna
Division No. 30 of The Order of Railroad Telegraphers,
Petitioner,

vs.

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COM-
PANY,

Respondent.

RESPONDENT'S BRIEF.

Opinions Below.

(1) Opinion of PEBSONIUS, J., denying the application for removal, 183 Misc. 454, 50 N. Y. Supp. (2d) 313.

(2) Opinion of KNIGHT, D. J., remanding action and denying motion to dismiss complaint, 56 Fed. Supp. 634.

(3) Opinion of NEWMAN, J., denying motion to dismiss complaint (not reported), printed at R. 22-24.

(4) Opinion of Appellate Division of the Supreme Court per HILL, P. J., unanimously affirming order denying motion to dismiss complaint, 269 App. Div. 467, 57 N. Y. Supp. (2d) 65, printed at R. 25-26.

(5) Opinion of NEWMAN, J., on granting judgment (not reported), printed at R. 275-278.

(6) Opinion of Appellate Division of the Supreme Court, *Per Curiam*, on unanimous affirmance of judgment, 274 App. Div. 950, 83 N. Y. Supp. (2d) 513, printed at R. 282-283.

(7) Opinion of Court of Appeals per CONWAY, J., and dissenting opinion, DESMOND, J., on affirmance of judgment, 299 N. Y. 496, 87 N. E. (2d) 532, printed at R. 356-369.

Jurisdiction.

The petitioner invokes the jurisdiction of this Court under Section 1257 (3) of Title 28 of the United States Code, under claim that the National Railroad Adjustment Board had exclusive jurisdiction under the Railway Labor Act to determine the controversy.

Statement of the Case.

This action was instituted in the Supreme Court of the State of New York for the construction of certain contracts between respondent and petitioner and between respondent and Louis J. Carlo as General Chairman of System Board of Adjustment, Delaware, Lackawanna and Western Railroad, of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, hereinafter referred to as the "Clerks." No appeal was taken by the clerks from the judgment of the Trial Court and they are not a party to this review.

The history of the litigation is as follows: The action was commenced by the service of the summons and complaint on the petitioner on March 3, 1944, and on the general chairman of the clerks on March 10, 1944. On March 23, 1944, petitioner filed a petition and bond for removal of the action to the United States District Court for the Western District of New York and applied to the State Supreme Court for an order removing the action to said United States District Court. The application was denied. Thereafter the bond was approved by the Hon. John Knight, United States District Judge for

said District and the record filed in the District Court. The petitioner thereupon moved in said Court to dismiss the action for lack of jurisdiction and the respondent made a cross motion to remand the case to the State Court. The motion to dismiss was denied and the motion to remand granted. The defendants then answered the complaint and petitioner moved in the State Supreme Court to dismiss the complaint. The motion was denied. The petitioner appealed to the Appellate Division of the Supreme Court where the order denying dismissal was unanimously affirmed. The action was tried on August 6, 1945, and decided on January 9, 1946. The petitioner appealed from the judgment to the Appellate Division of the Supreme Court which unanimously affirmed the judgment. The petitioner appealed by permission of the Court of Appeals to that Court and the Court of Appeals affirmed the judgment.

This controversy arose over the positions held and work performed by three crew callers in the yard office of the respondent at Elmira, New York. Prior to May 1, 1938, the railroad employed at Elmira three clerk-operators in its passenger station, three towermen at the Lehigh Valley tower in its yard and three operators at the yard office, all of which positions were listed in the Telegraphers' union agreement, and three crew clerks or crew callers in the yard office who were within the Clerks' union agreement. Each position was a three-trick job and the three men represented the three tricks of duty. On May 1, 1938, there was a consolidation at Elmira which resulted in the jobs of the three operators in the yard office being abolished (R. 49-50). This change was made in the interest of economy, as there was scarcely enough work for nine men in the twelve positions (R. 50). The telegraph instruments were taken out of the yard office (R. 50). The telegraphic duties of the operators were distributed to the others covered by the Telegraphers'

agreement, the sending of telegrams being transferred to the clerk-operators at the passenger station and the issuance of all clearance cards and train orders which directly governed the movement of trains being transferred to the towermen who were reclassified as operator-towermen at an increase in pay. The crew clerks were left in the yard office (R. 50) and the clerical work which the operators had been doing was left in the yard office to be performed by the crew clerks (R. 50-51). It always has been the custom for telegraphers to perform other duties of a clerical nature to fill out their day and it was this portion of the clerical work which was assigned to the crew clerks when the operators' positions were abolished (R. 41, 73-74, 76-77, 81).

The matter of reduction or increase of forces was for the railroad management to decide (R. 70, 73-74, 94, 194) but the railroad did not act arbitrarily. The officials conferred with General Chairman Voss of the Telegraphers' union before the change was authorized (R. 50-51). He concurred in the change, providing the men in the tower were given the operators' rate of 74 cents rather than the towermen's rate of 71 cents which they had been receiving (R. 51). The operator-towermen were given the 74-cent rate (R. 51). This was confirmed by letter, Exhibit 4 (R. 52, 250).

The union agreement with the Telegraphers' union then in force is in evidence as Exhibit 1. Such agreement was effective from January 1, 1929 to May 1, 1940 (R. 40). That agreement listed the Telegraphers' positions at Elmira as clerk-operators for the three tricks, and in Elmira yard as operators for the three tricks (which positions were abolished) and as towermen for three tricks (which positions were abolished and for which positions of operator-towermen at the increased rate were substituted) (R. 40, 298).

General Chairman Voss never protested the change made, and he remained in office until June, 1939 (R. 52). Later, the change was protested and on November 9, 1939, General Superintendent Moffatt met General Chairman Chadwick and his Committee for discussion of 18 cases, one of which, No. 7, involved the Elmira yard office. A settlement of the 18 cases was discussed and followed by the letter, Exhibit 8. In respect to case No. 7, the Elmira yard operators, the answer of the company was:

"Elmira Yard Operators. Present arrangement to be continued until such time as grade crossing project is completed when present tower operators will be transferred to the yard office" (R. 57, 255).

By this same letter the company indicated its willingness to add 14 positions not previously within the Telegraphers' agreement to the Telegraphers' schedule (R. 256). The settlement of the 18 cases in dispute was accepted by the General Committee by letter, Exhibit 9 (R. 57, 257), on December 4, 1939.

The grade crossing elimination referred to has not been completed. It has been ordered by the Public Service Commission and is a post-war project (R. 66-67).

On January 12, 1940, General Chairman Chadwick gave notice of opening up the existing union agreement and a new union agreement was negotiated between the railroad and telegraphers, Exhibit 10 (R. 57-58, 329-350). The union asked that the three positions in question be added to the agreement and the company refused (R. 62-63). This agreement, effective May 1, 1940, as finally agreed on, listed as the telegraphers' positions in Elmira only the three operator-clerks in the passenger station and the three operator-towermen in the yard (R. 346).

The agreement, Exhibit 10, contains no rule defining the work or duties of the positions. The General Chair-

man of the Telegraphers' union so testified and their counsel stated there was nothing in the agreement defining the work of the positions listed (R. 142, 186).

It was the position of the railroad that the positions covered by the Telegraphers' agreement were the positions listed therein, that the negotiations were on that basis and that no position was covered by the agreement until negotiated into the listing (R. 61). The railroad recognizes that the handling of train orders, clearance cards and messages by telegraph is work which belongs to the Telegraphers and all positions whose occupants perform such work are listed in the agreement (R. 50).

The Telegraphers contended that any conversation, over the telephone, important enough to be written down and made a record of should be regarded as telegraphers' work, regardless of whether it governed train movement (R. 170-171, 181). They claimed all such work but admitted they had never been able to have the railroad subscribe to such contention (R. 142). The management never having agreed to that contention, it was never embodied in any agreement with the Telegraphers. Nevertheless, the Telegraphers attempted to stand on it and make it the basis of their claim. They claimed that three men on the Telegraphers' extra list who did no work themselves should be paid under the agreement for work performed by the crew callers retroactively to May 1, 1938 (R. 184, 262, 271). Those three men were unidentified and neither General Chairman Chadwick nor General Chairman Slocum had any written claim from any individual employee or any authorization to present a claim on behalf of any individual employee to the railroad (R. 147, 183). There was no proof the crew callers ever handled train orders, clearance cards or telegraph messages.

The Clerks' union claimed the positions and work under their agreements (R. 100, 93, 68) and the Telegraphers under their agreements and the railroad brought this action to have the existing agreements construed and the rights and liabilities of all parties thereunder determined by declaratory judgment.

The Court found and declared that the positions in question and the work assigned to the crew callers came within the Clerks' agreement and not within the Telegraphers' agreement (R. 236, 242, 247) and found also that the Telegraphers were estopped by their acts and conduct at the time of and subsequent to the change as well as by their agreement from claiming said positions or work (R. 239, 244).

In the Appellate Division of the Supreme Court, which Court had power to review the facts and the weight of evidence, the petitioner did not raise the question that the findings of the Trial Court were not correct or not amply supported by the evidence.

In the Court of Appeals the only contention raised by the petitioner which could be used to invoke the jurisdiction of this Court under Section 1257 (3) of Title 28 of the United States Code was the contention that the National Railroad Adjustment Board had *exclusive* jurisdiction to determine the controversy (299 N. Y. 499) (R. 356-357).

Summary of Argument.

I. The Supreme Court of the State of New York had jurisdiction to interpret the contracts. Procedure before the National Railroad Adjustment Board was not an exclusive remedy nor an essential preliminary to the bringing of the action. The decision in *Moore v. Illinois Cent.*

R. Co., 312 U. S. 630, has determined the question adversely to the petitioner's contentions.

II. There is no reason of public policy requiring the Court to read into the Railway Labor Act by implication a withdrawal of the right of the Courts to interpret the contracts in the first instance. The Railway Labor Act does not require such an interpretation to render it effective. The function of the Interstate Commerce Commission in determining the reasonableness of established freight rates is not comparable to the function of the Railroad Adjustment Board in passing on disputes involving the interpretation of union agreements.

ARGUMENT.

I.

The Supreme Court of the State of New York, a court of general jurisdiction, had jurisdiction to interpret the agreements and determine the controversy.

The very question which petitioner raises was decided by this Court on March 31, 1941. In *Moore v. Illinois Cent. R. Co.*, 312 U. S. 630, it was squarely held that the procedure before the National Railroad Adjustment Board was not an exclusive remedy and that a party was not compelled to present its claim to such Board, but had the choice of resorting to a court of competent jurisdiction in the first instance. It was held therein that the party need not seek an adjustment of the controversy as provided in the Railway Labor Act as a prerequisite to the bringing of an action in the State Court. In an opinion by Mr. Justice Black in that case the Court said, 312 U. S. 630, at pages 634-636:

"But we find nothing in that Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court. * * * It is to be noted that the section pointed out, §153 (i), as amended in 1934 provides no more than that disputes 'may be referred * * * to the * * * Adjustment Board * * *'. It is significant that the comparable section of the 1926 Railway Labor Act (44 Stat. 577, 578), had, before the 1934 amendment, provided that upon failure of the parties to reach an adjustment a 'dispute shall be referred to the designated adjustment board by the parties, or by either party * * *'. Section 3(e). This difference in language, substituting 'may' for 'shall,' was not, we think, an indication of a change in policy, but was instead a clarification of the law's original purpose. For neither the original 1926 Act, nor the Act as amended in 1934, indicates that the machinery provided for settling disputes was based on a philosophy of legal compulsion. On the contrary, the legislative history of the Railway Labor Act shows a consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature. The District Court and the Circuit Court of Appeals properly decided that petitioner was not required by the Railway Labor Act to seek adjustment of his controversy with the railroad as a prerequisite to suit for wrongful discharge."

The decision in the *Moore* case has never been overruled or modified and has been followed in many state and federal cases:

In the case of *Washington Terminal Co. v. Boswell*, 124 Fed. (2d) 235, affirmed 319 U. S. 732, Associate Justice Rutledge writing for the United States Court of Appeals for the District of Columbia stated at page 238:

"The decision" (*Moore v. Illinois Cent. R. Co.*, 312 U. S. 630) "establishes that in such circumstances the Act has neither excluded the general jurisdiction of the Courts nor made exhaustion of the administrative remedy prerequisite to its exercise, for decision of controversies which might be determined by the statutory method. At the threshold of controversy accordingly, the disputants have alternate routes which they may follow. One is entirely judicial without regard to the Railway Labor Act. The other is administrative and judicial, according to its terms."

and at page 244:

"The *Moore* decision holds that Congress has not compelled disputants to go before the Board."

and again at page 249:

"The foregoing considerations are reinforced by the fact that the carrier under the decision in *Moore v. Illinois Cent. R. Co.*, *supra*, can bring its suit on the contract, independently of the statute, prior to the time when the dispute is submitted to the Board. Until then, at least, it has its election to pursue the exclusively judicial remedy or to follow the administrative and judicial one provided by the Railway Labor Act."

It will be noted that in the *Washington Terminal Co. v. Boswell* case the action was for a declaratory judgment by the employer and it was not held that the form of action was not proper or that such action ~~could~~ not be brought by any party to the dispute. The ground for dismissal was that the dispute had actually been submitted to and decided by the Railroad Adjustment Board. Even as to dismissal on that ground, the affirmance was by an evenly divided Court.

In *Elgin, J. & E. Ry. Co. v. Burley, et al.*, 325 U. S. 711, Mr. Justice Rutledge delivered the opinion of the

Court and discussed the *Moore* case at page 721. The discussion is amplified by Footnote 11 to said opinion where it was stated:

"The problem presented was whether the Adjustment Board procedure either was exclusive or was an essential preliminary to judicial proceedings within the doctrine of primary jurisdiction."

/ The wording of the statute in respect to the referring of disputes to the National Railroad Adjustment Board is "may be referred" which clearly is not mandatory. The applicable section of the Railway Labor Act (U. S. Code, Tit. 45, §153 subd. First par. (1)) reads:

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

The respondent has sought no rights under the Railway Labor Act but brought this action only for a construction or interpretation of the contracts between the parties. Like the plaintiff in the *Moore* case, it rests its case on the existing contracts.

Before the Railway Labor Act of 1934 was enacted, the State Courts took jurisdiction of controversies involving the construction of working agreements such as those involved in this case (*Piercy v. Louisville & Nashville Ry. Co.*, 198 Ky. 477, 248 S. W. 1042; *McGregor v. Louisville*

Nashville Ry. Co., 244 Ky. 635, 51 S. W. (2d) 953; *Panhandle and Santa Fe Ry. Co. v. Wilson* (Texas), 55 S. W. (2d) 216; *Long v. Baltimore & Ohio R. R. Co.*, 155 Md. 265, 141 Atl. 504; *Gregg v. Starks*, 189 Ky. 32, 224 S. W. 459; *Rentschler v. Missouri Pacific Ry. Co.*, 126 Nebraska 493, 253 N. W. 694; *McCoy v. St. Joseph Belt Ry. Co.*, 229 Mo. App. 506, 77 S. W. (2d) 175; *George T. Ross Lodge v. Brotherhood of Railroad Trainmen*, 191 Minn. 373, 254 N. W. 590; *Gary v. Central of Georgia Ry. Co.*, 37 Ga. App. 744, 141 S. E. 819). There has been no ousting of the jurisdiction of the State Courts by the enactment of the Railway Labor Act (*Moore v. Illinois Central* [*supra*]). The following are some of the cases adjudicated in the State Courts since enactment of the Act: *Brotherhood of Locomotive Engineers v. Mills*, 43 Ariz. 379, 31 Pac. (2d) 971; *Florestano v. Northern Pacific Ry. Co.*, 198 Minn. 203, 269 N. W. 407; *Moore v. Illinois Central*, 180 Miss. 276, 176 So. 593; *Swilley v. G. H. & S. A. Ry. Co.* (Texas), 96 S. W. (2d) 105; *Franklin v. Pennsylvania-Reading S. S. Lines*, 122 N. J. Eq. 205, 193 Atl. 712; *McCrary v. Kurn* (Mo.), 101 S. W. (2d) 114; *Lyons v. St. Joseph Belt Ry. Co.* (Mo.), 84 S. W. (2d) 933; *Evans v. Louisville & N. R. Co.*, 191 Ga. 395, 12 S. E. (2d) 611; *Wooldridge v. Denver & R. G. W. R. Co.*, 188 Col. 25, 191 Pac. (2d) 882; *Edelstein v. Duluth, M. & I. R. Ry. Co.*, 225 Minn. 508, 31 N. W. (2d) 465; *Coyle v. Erie R. Co.*, 142 N. J. Eq. 306, 59 Atl. (2d) 817; *Southern Ry. Co. v. Order of Ry. Conductors of America*, 210 S. C. 121, 41 S. E. (2d) 774, 54 S. E. (2d) 816. (Cert. granted Dec. 12, 1949.)

Federal Courts within the State of New York have recognized the jurisdiction of the State Courts as proper tribunals to decide questions arising out of working agreements such as here presented (*Swartz v. So. Buffalo Ry. Co.*, 44 Fed. Supp. 447; *McDermott v. New York Central R. Co.*, 32 Fed. Supp. 873).

The construction of the working agreements is frequently by declaratory judgment (*Piercy v. Louisville & Nashville Ry. Co.*, 198 Ky. 477, 248 S. W. 1042; *Burton v. Oregon-Washington R. & Nav. Co.*, 148 Ore. 648, 38 Pac. (2d) 72; *Louisville & Nashville R. Co. v. Bryant*, 263 Ky. 578, 92 S. W. (2d) 749; *Wooldridge v. Denver & R. G. W. R. Co.* (Col.), 191 Pac. (2d) 882; *Southern Ry. Co. v. Order of Ry. Conductors of America*, 210 S. C. 121, 41 S. E. (2d) 774, 54 S. E. (2d) 816).

The petitioner advanced in the state courts the claim that the controversy here is not justiciable, relying on the decisions of *General Committee of Adjustment v. M. K. T. R. R. Co.*, 320 U. S. 323, and *General Committee of Adjustment v. Southern Pacific R. Co.*, 320 U. S. 338. Those cases are cited here by the petitioner. They are purely representation cases and have no application to this case which involves the question of interpretation of existing contracts. The *Southern Pacific* and *M. K. T.* cases presented the question of which union was the proper bargaining representative for the engineers in handling controversies with the carrier's representatives. In the *Southern Pacific* case, the Engineer's union claimed to be the exclusive representative of all engineers whether belonging to their union or the Firemen's union in handling their individual grievances. It sought to have the collective bargaining agreement between the Carrier and the Firemen, which provided that an engineer had the right to be represented by the committee of his own organization in the handling of his grievances, declared invalid under the Railway Labor Act. In the *M. K. T.* case, the Engineer's union sought a declaratory judgment that it be declared the sole representative of the locomotive engineers with exclusive right to bargain for them and that the mediation agreement which had been made between the Firemen's union and the Carrier be declared invalid as in violation of the Railway Labor Act. The

Engineer's union claimed that the Carriers had no right under the Act to negotiate with the Firemen's union on the subject of emergency engineers. This Court in each case held that such representation problems did not present justiciable controversies but should be resolved by the mediation procedure provided by the Act.

There is no representation dispute in the case at bar. It is pleaded in the complaint and admitted in the answers that the petitioner Union is the sole bargaining agent for the telegraphers (R. 5, 19), and that the other defendant Union is the sole bargaining agent for the clerks (R. 7, 16). The only issue involved in this case is which contract covers the positions held by the crew clerks. While the Courts will not determine who is the proper bargaining agent, the Courts will interpret the contracts duly and regularly entered into between the carrier and such sole bargaining agents.

The distinction between disputes involving the formation of agreements and disputes under existing agreements was clearly pointed out in *Elgin, Joliet & Eastern Ry. Co. v. Burley*, 325 U. S. 711. The Court of Appeals in this case, quoting from the *Burley* case, said (299 N. Y. 496, 501-502) (R. 359):

"Beyond the initial stage of negotiations and conference the act provides for different methods of settlement for the two classes of disputes. As pointed out in *Elgin, Joliet & Eastern Ry. Co. v. Burley* (325 U. S. 711, 723), the first type 'relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.' Concerning that class of disputes the act provides first for

mediation before the National Mediation Board, if that fails, then voluntary arbitration; and if that fails, conciliation by presidential intervention (U. S. Code, tit. 45, §§155, 157, 160; see *Burley case, supra*, p. 725).

"The second class of disputes 'contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one' (*Burley case, supra*, p. 723). All parties and the Courts below agree that the instant case is within the second classification, and that the course prescribed by the act for the settlement of this type of dispute is submission to the Railroad Adjustment Board. . . . It will be noted that the wording of the statute with respect to the submission of disputes to the Board is 'may be referred' which is clearly not mandatory."

The petitioner relies also on the case of *Order of Railway Conductors v. Pitney*, 326 U. S. 561. In that case a dispute arose as to whether the yard conductors represented by the Trainmen's Union or the road conductors represented by the Conductor's Union should operate certain trains within the yard. The District Court had to act in a dual capacity as the railroad was in bankruptcy in that court. It had to instruct its trustees how to proceed and in so doing was obliged to interpret the union agreements. The conductors claimed that the work in question could not be taken from them and given to the trainmen without negotiating the work out of their contract and asked the Court to enjoin such transfer of work unless such contract was changed by the method prescribed by the Railway Labor Act. They sought an injunction restraining the trustees from transferring the work until negotiated out of their contract by the process of mediation. The District Court had to determine whether there was any clear violation of a right given by Congress and in determining such question would have

to interpret the conductors' agreement to determine whether it gave the conductors the work. If it did not, no negotiation of a new agreement was necessary. This Court held that the District Court properly proceeded to interpret the agreements insofar as instructing its trustees was concerned but it should have refrained in its discretion from interpreting the contracts as a basis for injunctive relief to give the parties the opportunity to have the contracts interpreted by the National Railroad Adjustment Board.

The fact that the Court had to interpret the contracts in two capacities, in the first of which it was identified with one of the parties to the dispute, made it proper and desirable that it should pass the question to another tribunal for determination as between the parties.

The *Pitney* case does not hold that the matter was not justiciable as it was suggested that it be given to the Adjustment Board which equally with the Courts under the *Moore* decision may interpret the contracts. It does not deny to the Courts the right to interpret the contracts but states that under the circumstances of that case as a matter of discretion the court of equity should stay its hand. Furthermore, the case was essentially one in reference to alteration of an existing contract, a case on the mediation rather than the adjustment side of the statute, the suit being one for an injunction to stay what was claimed to be a clear violation of a right given by the statute, i. e., that the existing agreement be changed only in the manner prescribed by the Act.

There is nothing in the *Pitney* case in conflict with the decision in the case at bar where the Court merely has exercised its jurisdiction to interpret existing contracts. No question of negotiating contracts is involved and no question of acting in a dual capacity.

The cases of *Missouri, Kansas, Texas R. Co. v. Randolph*, 164 Fed. (2d) 4, and *The Order of Railroad Telegraphers v. New Orleans, Texas & Mexico Ry. Co.*, 156 F. (2d) 1, cited by the petitioner are readily distinguishable from the case at bar. In each of those cases the complaining union was asking the Federal Court to interfere by injunction with the action of another union and the carrier taken or threatened to be taken pursuant to the Railway Labor Act but claimed to violate rights of the complaining union. In each case, the Court found that a proper showing had not been made to require the Federal Court to intervene by injunction and the parties were left to pursue their remedies under the Railway Labor Act. They are examples of the policy of the Federal Courts not to interfere by injunction with the normal processes of acquiring rights under agreements negotiated under the provisions of the Railway Labor Act.

The Court of Appeals found that the *Moore* case was controlling on the facts of the case at bar and followed it in affirming the judgment.

II.

No considerations of public policy require that the Courts be precluded from interpreting existing contracts.

The petitioner argues that the *Moore* case should be overruled or limited to its precise facts and that jurisdiction should be denied to the Courts to interpret existing contracts. It is asserted that public policy requires that a party to a dispute under an existing contract should be required to first go to the Railroad Adjustment Board for an administrative finding. But in pro-

ceeding before the Adjustment Board, the party would have elected to follow that remedy and the Board would thus obtain exclusive jurisdiction. The argument is that the statute is similar to the Interstate Commerce Act and that the doctrine first announced in *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, should be applied. In that case it was held that a shipper seeking reparation because of the claimed unreasonableness of the established rate must, under the Interstate Commerce Act, primarily seek redress through the Interstate Commerce Commission. The statute was designed to establish reasonable and uniform rates to all shippers and the carrier was not lawfully permitted to deviate from the published tariff rate. The statutory purpose to establish uniformity and nondiscrimination would be defeated if Courts and juries were permitted to determine what were reasonable charges without reference to the established and uniform rate. The Court adopted the rule of primary resort to the Interstate Commerce Commission only after it had determined that the pre-existing right of resort to the Courts was so repugnant to the statute that it would render its provisions nugatory. The Court said at pages 436 and 437:

“In testing the correctness of this proposition we concede that we must be guided by the principle that repeals by implication are not favored, and indeed that a statute will not be construed as taking away a common-law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory.”

In cases arising under the Interstate Commerce Act where overcharges or undercharges are involved because

the charges made are contrary to the published tariff rate, the Courts have jurisdiction to entertain the actions. This Court took away from primary determination by the Courts only that class of cases which would interfere with the duty of the Interstate Commerce Commission to maintain such uniform and reasonable rates.

The Interstate Commerce Commission is a regulatory body and quasi-judicial tribunal charged by Congress with the maintenance of a statutory standard.

The National Railroad Adjustment Board is a fundamentally different body. It is not charged with the maintenance of statutory standards and is not a regulatory body. Its members are chosen for each division in equal number from and by the carriers and the national labor organizations. They are representatives of said carriers or organizations and compensated by them. In case of deadlock a neutral person is chosen to sit with the division as a member and make an award. This Referee, who may or may not be familiar with railroading, has the deciding vote. Regional boards may be set up under the Act by agreement of the carriers and representatives of the employees which can adjust and decide disputes of the character referable to the National Railroad Adjustment Board.

The Railway Labor Act was not intended by Congress to establish a policy of providing uniformity in collective bargaining agreements. The policy was to avoid interruption to interstate commerce by providing for free collective bargaining and prompt and orderly settlement of disputes. The free exercise of the right of collective bargaining between the many carriers and their various classes of employees necessarily results in a wide disparity between the contracts. In interpreting the contracts each must stand on its own terms and provisions. The terms of the agreements are of interest only to the parties, the

public being interested only in the fact that the flow of interstate commerce is not interrupted or seriously hampered by labor disputes. In *Terminal Railroad Association of St. Louis v. Brotherhood of Railroad Trainmen*, 318 U. S. 1, this Court in an opinion by Mr. Justice Jackson said:

"The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulations of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. The federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce. The Mediation Board and Adjustment Board act to compose differences that threaten continuity of work, not to remove conditions that threaten the health or safety of workers."

It was held in that case that the Railway Labor Act does not preclude state action in regulation of working conditions. Likewise there is nothing in the Act to preclude state judicial action to the end that controversies arising out of the interpretation of contracts may be settled. In creating the Adjustment Board the plain intent of Congress was to provide an additional tribunal which might be used at the option of the parties. As heretofore shown the state courts were exercising jurisdiction in contractual disputes at the time of the enactment of the act. To apply the test of the *Abilene* case, the pre-existing right of the Courts to act is not so repugnant to the statute as to render its provisions nugatory. The Courts

have been exercising that jurisdiction for the fifteen years since the enactment of the act to the benefit of the litigants, the industry and the public. No railroad employee having a claim against his employer on contract should be obliged to go to the board to have his contractual rights and obligations determined when local courts, federal or state, provide a more convenient forum.

There is nothing in the legislative history of the Railway Labor Act to indicate that the right to determine disputes arising on contract was to be withdrawn from the jurisdiction of the courts. The report of the House Committee on Interstate and Foreign Commerce on the bill (House Report No. 1944, 73rd Congress, 2nd Session, p. 2) stated that "the bill does not introduce any new principles into the existing Railway Labor Act."

Any delay in progressing this controversy through the state court is largely attributable to the petitioner's efforts to remove a non-removable case and to have the state court hold that it lacked or should decline on discretionary grounds to exercise jurisdiction.

CONCLUSION.

It is respectfully submitted that the Courts below correctly held that their jurisdiction had not been withdrawn in an action involving the construction or interpretation of existing contracts by the enactment of the Railway Labor Act and correctly relied on the decision of *Moore v. Illinois Cent. R. Co.*, 312 U. S. 630 as controlling on that question and that the judgment should be affirmed.

Respectfully submitted,

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